

07-214651-FC



JUDGE DANIEL P. O'BRIEN  
COUNTY PEOPLE V MCBURNEY, STE

STATE OF MICHIGAN  
IN THE DISTRICT COURT FOR THE COUNTY  
52ND DISTRICT 1ST DIVISION

PEOPLE OF THE STATE OF MICHIGAN,

-v-

RECEIVED District Court Case No.:  
OAKLAND COUNTY CLERK 06-007954-

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Circuit Court Case No.:

'07 SEP 19 A8:57

STEVEN LINDSEY MCBURNEY,

DEFENDANT/

DEPUTY COUNTY CLERK

PRELIMINARY EXAMINATION  
VOLUME II

BEFORE HONORABLE BRIAN MACKENZIE, DISTRICT JUDGE, P24097

NOVI, MICHIGAN

May 17, 2007

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NOVI, MICHIGAN

Thursday, May 17, 2007 at about 2:24 p.m.

(The Court, counsel, and all parties  
present.)

THE COURT: Call it Mr. Prosecutor.

MR. SKRZYNSKI: Good afternoon, Your  
Honor, my name is John Skrzynski, I am here  
for the Prosecutor. This is the case of  
People against Steven McBurney, this is your  
case 06 280580 --

THE COURT: Well, I don't have the  
Defendant.

MR. SKRZYNSKI: I'm sorry, that's the  
wrong number. The number is 06 007954.

MR. WHITE: Robert White appearing on  
behalf of Mr. McBurney. Can we take care of  
a preliminary matter while --

THE COURT: No, I haven't got your  
client.

MR. WHITE: Okay.

THE COURT: Calling the matter of  
People versus Steven McBurney, 06 7954. I  
need your appearances again gentlemen.

1 MR. SKRZYNSKI: Good afternoon, John  
2 Skrzynski for the People.

3 MR. WHITE: Robert White appearing on  
4 behalf of Mr. McBurney.

5 THE COURT: All right. And I  
6 understand that we were at the following  
7 place; we are about to hear testimony from  
8 the medical examiner. After we have heard  
9 that, there is going to be a proffer by the  
10 Prosecution to admit an exhibit that are  
11 hospital records of an alleged prior  
12 incident. Defense is objecting to that on a  
13 number of grounds and you're going to need  
14 to argue that, but rather than do that now,  
15 everyone has agreed we can pretty much do  
16 the medical examiner and then we can shift  
17 over into that argument since it not only  
18 ties into admissibility, but most ultimately  
19 I think as to whether or not I am going to  
20 bind this matter over. So, let's proceed in  
21 that manner unless there is some objection.

22 MR. WHITE: No objection, Your Honor.  
23 I do have a preliminary matter.

24 THE COURT: What is it, Counsel?

25 MR. WHITE: I have made a Motion to

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1 Sequester the Prosecutor's witness, not only  
2 the witnesses that would be appearing here  
3 at the preliminary examination, but  
4 ultimately at trial. There are two people  
5 sitting in the back that I believe will be on  
6 the Prosecutor's Trial Witness List. The  
7 mother of the child from the 1998 case and  
8 the grandmother. Both were interviewed as  
9 part of this case. I would ask that they be  
10 removed from the courtroom, unless the  
11 Prosecutor agrees that they are not going to  
12 testify in the ultimate criminal trial if  
13 there is one.

14 MR. SKRZYNSKI: No, I can't say that they  
15 will not testify in a trial.

16 THE COURT: I am not going to  
17 exclude them. I don't do frivolous acts.  
18 If I excluded them and then handed them a  
19 transcript or they ordered a transcript they  
20 would know exactly what they would hear, and  
21 frankly my view of human memory isn't such  
22 that them listening to this testimony  
23 assuming that I bound it over would be able  
24 to cause them to remember several months  
25 from now what to testify to. Purposes, I

1 think, are not served under those  
2 circumstances.

3 If they were going to be testifying at  
4 this exam I would agree with you, Counsel.  
5 But, since the transcripts are public record  
6 I don't see any reason to do that. Motion  
7 is denied.

8 MR. WHITE: Thank you.

9 THE COURT: With the exception that  
10 if you are going to call anyone other than  
11 the medical examiner.

12 MR. SKRZYNSKI: No, Your Honor.

13 THE COURT: Then those people shall  
14 step out of the courtroom. And if the  
15 Defense is going to call anyone at this  
16 proceeding who has not yet testified they  
17 will step out of this courtroom. All right,  
18 call your witness.

19 MR. SKRZYNSKI: At this time, the People  
20 call L.J. Dragovic.

21 THE COURT: If you would take the  
22 witness stand, remain standing and raise your  
23 right hand I would appreciate it. Do you  
24 solemnly swear or affirm the testimony you  
25 are about to give is the truth, the whole

1 truth, and nothing but the truth?

2 THE WITNESS: I do.

3 THE COURT: Be seated please. Will  
4 you please state your name for the record  
5 and then spell it for my court recorder.

6 THE WITNESS: I am Ljubisa Jovan  
7 Dragovic, that's L-j-u-b-i-s-a, middle  
8 J-o-v-a-n, last D-r-a-g-o-v-i-c.

9 THE COURT: Doctor, a pleasure to see  
10 you again.

11 THE WITNESS: Thank you, Your Honor.

12 THE COURT: All right, are we going  
13 to get a stipulation to his expertise or do  
14 we need to go through it?

15 MR. WHITE: No, I am just going to  
16 stipulate the doctor is an expert.

17 THE COURT: All right, he is an  
18 expert in the area that the prosecution has  
19 proffered him, which is medical examination.

20 MR. SKRZYNSKI: Correct Judge, in the  
21 area of both forensic pathology and forensic  
22 neuropathology.

23 THE COURT: With that stipulation, is  
24 that correct, Counsel?

25 MR. WHITE: That's correct, Judge.

1 THE COURT: All right. Let's proceed,  
2 having cut all of about ten minutes.

3 MR. SKRZYNSKI: Thank you.

4 LJUBISA JOVAN DRAGOVIC

5 Called by the Prosecution at 2:28 p.m., sworn  
6 by the Court and testified.

7 DIRECT EXAMINATION

8 BY MR. SKRZYNSKI:

9 Q Doctor, you are the Chief Medical Examiner of  
10 Oakland County, correct?

11 A That's correct.

12 Q All right. And you are licensed to practice  
13 medicine in the State of Michigan?

14 A Yes, I am.

15 Q Okay. Did you perform an autopsy protocol  
16 on a person by the name Madison Olivia  
17 McBurney?

18 A Yes, sir.

19 Q Okay. Did you prepare an autopsy protocol on  
20 that person?

21 A Yes, sir.

22 MR. SKRZYNSKI: Okay. May I approach the  
23 witness, Judge?

24 THE COURT: Yes.

25 BY MR. SKRZYNSKI:



1 Q I want to show you what I have marked as  
2 People's Proposed Exhibit Number One. And I  
3 am asking you, first of all, is that several  
4 pages stapled together?  
5 (People's Proposed Exhibit Number One, Copy of  
6 Medical Examiner's Report, introduced at 2:30  
7 p.m.)

8 A This is material or a stack of ten pages, it's  
9 the photostatic copy of the original that I  
10 have here in my file pertaining to Madison  
11 Olivia McBurney; eleven month old white female  
12 child.

13 Q And is that a true and accurate copy of your  
14 original?

15 A Yes, it is.

16 Q Thank you. And are these -- is an autopsy  
17 protocol kept in the normal course of business  
18 at the Oakland County Medical Examiner Office?

19 A Yes, they are.

20 Q And is it part of the business of the Oakland  
21 County Medical Examiner to keep such records?

22 A Yes, sir.

23 MR. SKRZYNSKI: All right. At this time,  
24 Your Honor, we proffer Proposed Exhibit One.

25 MR. WHITE: Your Honor, may I voir

1           dire?

2                   THE COURT:           You may.

3                           VOIR DIRE

4       BY MR. WHITE:

5       Q     Doctor, Robert White, we have met before.

6       A     Yes.

7       Q     It appears that the date of examination was  
8           December 6th, 2006?

9       A     That is correct.

10      Q     Okay. And as part of the autopsy protocol  
11           you conducted an examination of the deceased,  
12           correct?

13      A     That is correct.

14      Q     And also it appears from the -- actually the  
15           package that I received from the Prosecutor  
16           that prior to conducting the autopsy protocol  
17           that you had been provided a copy of a police  
18           report from South Lyon Police Department, is  
19           that true?

20      A     I believe that there was -- and there is a  
21           police report. I don't know if it is a  
22           complete one, but yes that is correct, there  
23           is a copy of the police report.

24      Q     In fact, it was faxed to your office on  
25           December 4th, 2006, isn't that correct?

1 A That is correct, sir.

2 Q And it contained a variety of statements from  
3 various witnesses including E.M.S. personnel,  
4 the accused in this case, the mother, and the  
5 investigating police officers, correct?

6 A It does.

7 Q Okay. And you reviewed this report prior to  
8 your preparation of the autopsy protocol, is  
9 that true?

10 A I reviewed this report, I believe, prior to  
11 the actual examination --

12 Q Okay.

13 A -- of the body.

14 Q Okay. And also as part of the package that I  
15 received from the Prosecutor was a document  
16 called an Oakland County Medical Examiner  
17 Investigation, which it looks like a series of  
18 computerized notes.

19 A Yes, sir.

20 Q And they are dated December 5th, 2006?

21 A That's correct.

22 Q And it includes notations of contact made with  
23 U of M Physicians and a summary of the  
24 circumstances of death on page four?

25 A Page four?

1 Q Actually, at the bottom right-hand corner,  
2 it's on page 575 of the --

3 A No, no, no. This would be page three of  
4 five.

5 Q Three of five, you're absolutely right.

6 A Yeah, thank you.

7 Q It contains a summary of the statements made  
8 by U of M Officials supposedly, correct?

9 A U of M Officials? I am seeing here that it  
10 was University of Michigan Hospital contacts.  
11 I wouldn't call them University of Michigan  
12 Officials.

13 Q Okay. Physicians? Physicians?

14 A Yes.

15 Q Okay.

16 A That would be.

17 Q And you used that information also as part of  
18 the preparation of your autopsy protocol, is  
19 that true?

20 A No, that's not true. This is the information  
21 that I used prior to looking at the body.

22 Q Okay. So --

23 A And that's the standard procedure that  
24 preliminary investigation is done; gathering  
25 of information is accomplished, and of course

1           it's in progress because the investigation  
2           may be ongoing. But, that preliminary  
3           investigation is summarized in these  
4           documents and provided to me or my deputies  
5           for the purpose of continuing assessing the  
6           case.

7           Q    Sure. So, it was certainly part of the  
8           information that you had at the time that you  
9           conducted the examination of Madison McBurney?

10          A    Sure.

11          Q    Okay. And that that, based along with your  
12           examination, ultimately went into your  
13           conclusions containing your autopsy protocol,  
14           correct?

15          A    Let me just double-check this. I do not see,  
16           strictly speaking in my opinion, anywhere  
17           that there are conclusions made in reference  
18           to these particular documents, so.

19          Q    I am not asking -- I am not asking that,  
20           Doctor. I am asking you --

21          A    Then I misunderstood your question, I'm sorry.

22          Q    Didn't, in fact, you used the information that  
23           you received from the South Lyon Police  
24           Department police reports and the statements  
25           made by the U of M Physicians about the

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1           circumstances of death as part of your --  
2           part of your analysis and conclusions in your  
3           autopsy protocol?

4           A    I did review the information.  I considered  
5           the information.  But, I don't necessarily  
6           use the information in that fashion as you  
7           may feel or believe.  So, if someone says,  
8           well there was such and such thing I take a  
9           note of it, I consider it, but whether such  
10          and such thing takes place or not is a  
11          completely different issue.

12                So, while the information may be  
13          provided while I assess the information and I  
14          give it all due consideration, I do not  
15          necessarily factor all of that information  
16          into any of my subsequent considerations.

17          Q    Well, I am asking about this particular case.

18          A    Yes.

19          Q    And did you use any information provided by  
20          the South Lyon Police Department police  
21          report and the U of M Physician statements  
22          as part of your autopsy protocol?

23          A    No.

24          Q    No; okay.  And did -- also I see there is a  
25          letter in there written or signed by you

1 asking for U of M records, medical records,  
2 and that letter is dated December 13th, 2006?

3 A Yes, sir.

4 Q Okay. Did you receive those records?

5 A I believe so, they are contained here.

6 Q And when was your autopsy protocol prepared?

7 A My autopsy protocol was prepared -- I'll give  
8 you the exact date; 18th day of April of 2007,  
9 sir.

10 Q And you were in receipt of -- 18th day of  
11 April?

12 A Yes, sir. Or some time before that point, I  
13 can't tell you exactly. I can only tell you  
14 that there was a certified copy of autopsy  
15 report mailed to the Attorney General's  
16 Office, and it might have been available  
17 earlier than that, but that --

18 Q Okay.

19 A -- that's about the solid point that I know  
20 that it was available.

21 Q And is it true, Doctor, that you received the  
22 U of M Hospital records prior to completing  
23 your autopsy protocol?

24 A Sure.

25 Q And is it true also, Doctor, that you

1 reviewed those records?

2 A Yes.

3 Q And is it also true that those records were  
4 used as a basis for your opinion, any opinion,  
5 as part of your autopsy protocol?

6 A No, sir.

7 Q So, what you're -- is there anything else that  
8 you did as part of your preparation of your  
9 autopsy protocol besides the examination,  
10 besides the review of the South Lyon Police  
11 Department records, besides the review of the  
12 statements made by the U of M Physicians,  
13 besides the review of the U of M medical  
14 records, anything else that you did?

15 A Of course.

16 Q What?

17 A All of the viewed things that I was supposed  
18 to do in assessing this particular case,  
19 because a continuation of examination of this  
20 case was of such nature that included  
21 examination of the brain at subsequent dates.

22 Q I --

23 A And then examination of microscopic slides  
24 that were taken from those tissues that are  
25 critical to the assessment. So, all of that



1 process went on for several months. Nothing  
2 to do directly, or even indirectly, with  
3 anything that was provided as evidence from  
4 the hospital.

5 Q So, my question then is, other than your  
6 physical exam and the subsequent tests that  
7 you did, medical tests that you have just  
8 described, anything else that you did in order  
9 to prepare your autopsy protocol?

10 A When you are talking medical tests, I need to  
11 clarify those. These are not medical tests  
12 that are done in clinical setting. These  
13 are neuropathology procedures that are done  
14 as part of the general assessment process on  
15 any given case when there is brain trauma.  
16 And that process was accomplished and it took  
17 some time, but that would be the scope of  
18 things that I did.

19 Q Okay. So, if I am understanding your  
20 testimony correct, your opinions based on  
21 your autopsy protocol then are solely based  
22 upon your physical examination and these  
23 neuropathological tests, is that true?

24 A No, upon my physical examination of the whole  
25 body, upon the consideration of the age, the

1 size of this child, and upon the autopsy  
2 findings that are in the body and in the head  
3 as well.

4 Q Okay.

5 A So, it's the overall assessment of all of the  
6 things considered.

7 Q Okay. But, it had nothing to do with the  
8 police report?

9 A The police report I did review.

10 Q That's a yes or no, sir.

11 A Well --

12 Q Did it have anything to do with the police  
13 report?

14 A Let me --

15 MR. SKRZYNSKI: Well, Judge I'll object.  
16 This has been asked and answered. He asked  
17 him before if those matters had any basis --

18 THE COURT: Sustained.

19 MR. SKRZYNSKI: Thank you.

20 BY MR. WHITE:

21 Q It had nothing to do with the U of M records?

22 MR. SKRZYNSKI: Same objection.

23 THE COURT: Approach.

24 (Bench conference held at 2:42 p.m.; Court  
25 reconvened at 2:43 p.m.)

1 THE COURT: The Court is going to  
2 take a brief recess. I want to see Counsel  
3 in chambers.

4 (The Court in recess at 2:43 p.m., the Court  
5 reconvened at 3:02 p.m.)

6 THE COURT: Proceed.

7 MR. WHITE: Just a couple more  
8 questions, Your Honor.

9 RESUME VOIR DIRE

10 BY MR. WHITE:

11 Q Dr. Dragovic --

12 A Yes, sir.

13 Q Is there any other information that you  
14 received from outside sources prior to the  
15 preparation of your autopsy protocol, other  
16 than the South Lyon Police Department records,  
17 U of M records, the statements from the U of  
18 M Physicians, anything else from any outside  
19 source?

20 A Not that I can remember off the top of my  
21 head.

22 Q Okay. And if you would review your file,  
23 would that help you answer that question  
24 more fully?

25 A I believe that you have the contents of this

1 file, so I don't see anything else here that  
2 is -- constitutes communication by any  
3 outside entity.

4 MR. WHITE: Thank you, Judge. Nothing  
5 further.

6 THE COURT: Objection?

7 MR. WHITE: Yes, Your Honor. I object  
8 pursuant to MRE.703 that requires that  
9 anything that the facts are presented in a  
10 particular case upon which an expert relies,  
11 bases an opinion on, or an inference shall be  
12 in evidence, and I know that there has been  
13 some discussion about whether Dr. Dragovic  
14 actually relied on the documents, but let me  
15 tell you, first of all, South Lyon Police  
16 Department records were never introduced into  
17 evidence. The U of M medical records were  
18 never introduced into evidence. There has  
19 been no U of M doctor ever testify. And for  
20 us to now say that he did not use those as  
21 part of his preparation of his autopsy  
22 protocol, I believe it stretches the bounds  
23 of reason.

24 And I do believe, initially, he stated  
25 that he factored the Police Department

1 records and the statements of the physicians  
2 as part of the overall -- his overall  
3 preparation of the autopsy protocol. And  
4 that, I believe, invalidates his -- this  
5 particular document and I would ask pursuant  
6 to MRE.703 that it not be admitted.

7 THE COURT: Response?

8 MR. SKRZYNSKI: Judge, he testified that  
9 in forming his opinion he relied on the  
10 physical examination of the body, the  
11 protocol and the procedures of the  
12 neuropathologist, which he himself is and  
13 which he performed. He said that he did not  
14 -- he read those things before he did the  
15 autopsy and before he prepared the autopsy  
16 protocol, but he did not base his opinion on  
17 those things.

18 THE COURT: That's my understanding  
19 of his testimony. Objection is noted.  
20 Overruled; received.

21 (People's Exhibit Number One, Photocopy of  
22 Medical Examiner's Report, received and  
23 admitted into evidence at 3:06 p.m.)

24 MR. SKRZYNSKI: Thank you, Your Honor.

25 THE COURT: Proceed to Direct.

1 CONTINUATION OF DIRECT EXAMINATION

2 BY MR. SKRZYNSKI:

3 Q Doctor, you performed this autopsy on December  
4 6th of 2006, correct?

5 A December 6th, that's correct, sir.

6 Q Okay. Doctor, did you do an examination of  
7 the body itself?

8 A Yes, sir.

9 Q What did you find when you examined the body;  
10 external examination?

11 THE COURT: Wait, just a moment.

12 The Court is going to have to take a two  
13 minute recess.

14 (The Court in recess at 3:07 p.m., the Court  
15 reconvened at 3:08 p.m.)

16 BY MR. SKRZYNSKI:

17 Q What were your findings when you examined  
18 the body externally?

19 A Well, this was a 28 inch long, 32 pounds in  
20 weight, female infant.

21 Q Was that appropriate for an 11 month old?

22 A Yes, it would be in that span of 11 months  
23 of age, yes sir. There was -- there were  
24 some defects on the scalp that were part of  
25 the congenital problem of the skin. There

1           were -- there was evidence of medical .  
2           surgical intervention, and with a catheter  
3           in the right side of the head there was no  
4           trauma anywhere on the body; on the surface  
5           of the body.

6           Q   Now, Doctor, the three lesions that you saw,  
7                where were they on the head?

8           A   They were in the mid-line of the head. They  
9                were kind of apart from each other, and one  
10               was seven-eighths of an inch. The next one  
11               was a quarter of an inch, and there was --  
12               the one that was toward the back of the  
13               head, that was three-quarters of an inch  
14               defect.

15          Q   After you examined -- after you completed the  
16               entire autopsy of this body, did you find that  
17               those three lesions had anything to do with  
18               the cause of death of Madison McBurney?

19          A   They did not.

20          Q   Thank you. All right, Doctor, did you  
21               subsequently open the body and examine it  
22               internally?

23          A   Yes.

24          Q   What did --

25          A   I opened the body, the usual procedure;

1 examined the contents of the body cavities.  
2 That is the chest cavity, the body cavity.  
3 and the cranial cavity; the head.

4 Q What did you find?

5 A Examination of the head revealed, first of  
6 all, severe swelling of the brain, and  
7 bilateral organizing subdural hemorrhage.  
8 And then I preserved the brain tissue for  
9 further examination because it needed  
10 fixation. So, apart from those findings  
11 right there, subsequently I discovered upon  
12 examination of the brain extensive necrosis  
13 of the brain, multiple infarcts. That all  
14 represented the complications of severe brain  
15 swelling due to a reaction to the blunt  
16 trauma of the head that was the cause of  
17 bilateral subdural bleed.

18 Q Can you explain, Doctor, what a bilateral --  
19 first of all, the term bilateral, what does it  
20 mean?

21 A Both sides, both the right and left side.

22 Q And subdural, what does that mean?

23 A Subdural is pertaining to accumulation of  
24 blood underneath the hard covering of the  
25 brain. There is, anatomically speaking,



1           there is the skull that is covered tightly by  
2           the scalp of the outside. Underneath the  
3           skull there is a hard tough membrane that we  
4           refer to as dura, meaning hard. That is the  
5           membrane that is tightly adherent to the  
6           inside of the skull and touching upon the  
7           surface of the brain, which is right then and  
8           there covered by soft membranes called the  
9           piarachnoid that actually covering directly  
10          the surface of the brain.

11                 In between those soft meninges and the  
12          hard meninges is a virtual space, it's not a  
13          real space, it doesn't really exist unless  
14          there is accumulation of fluid in it and that  
15          becomes a subdural space. If there is  
16          bleeding, there is subdural hemorrhage. And  
17          if there is there bleeding over both halves  
18          of the brain, that's a bilateral subdural  
19          hemorrhage. So, this is a situation that I  
20          found that there was organizing bilateral  
21          subdural hemorrhage.

22          Q     When you say "organizing", what does that  
23                 mean?

24          A     When I say organizing, it means that there is  
25                 a process of healing that starts the moment

1 the injury takes place. And, obviously,  
2 there was indication there by the degree of  
3 this healing that injury occurred days prior  
4 to my examination.

5 Q Okay. Now, Doctor, you said that you also  
6 saw that there was severe brain swelling, is  
7 that correct?

8 A That is correct.

9 Q All right. Can you explain to us how brain  
10 swelling can occur?

11 A Brain has tissue, the human body, any living  
12 organism in animal kingdom is a structure  
13 that when there is some injury of some  
14 unfavorable circumstance that is brought upon  
15 it, it reacts by swelling. Immediately  
16 reacts by starting to swell. That swelling  
17 may take time. It may occur over a period  
18 of hours, it may complicate over a period of  
19 days, but that's the only biological reaction  
20 that the brain reacts to something that  
21 acutely puts the brain in an unfavorable  
22 circumstance.

23 Q All right. So, in this case, you did detect  
24 that the brain had swelled?

25 A Correct. And then I have to clarify, it's

1 not only physical trauma to the brain that  
2 can cause swelling. It may be deprivation of  
3 oxygen for a period of time that would allow  
4 the brain to react by swelling. So, any  
5 unfavorable circumstance in general would  
6 create this response, the biological response  
7 of the brain in the form of swelling.

8 Q Once the brain starts to swell, Doctor -- the  
9 skull is a closed compartment, is it not?

10 A That is correct, sir.

11 Q Once the brain starts to swell, can it swell  
12 beyond the capacity of the interior of the  
13 skull?

14 A It would have a tendency in severe head  
15 trauma to try to swell beyond the capacity,  
16 and when that happens beyond the confines of  
17 the skull, the inner confines of the skull,  
18 when that happens then the brain will seep  
19 through the openings in the base of the  
20 skull, and that is referred to in  
21 neuropathology and pathology as herniation.  
22 Simply bulging brain tissue, which is soft  
23 and generally light, through the openings at  
24 the bottom of the skull.

25 Q Did you find those conditions here on this

1 little girl?

2 A Yes, sir.

3 Q Okay. What are the consequences of brain  
4 herniation?

5 A Brain herniation causes interference with  
6 blood supply to the brain above those points  
7 of herniation. It also creates a risk for  
8 further herniation and pressure of the brain  
9 stem; interference with breathing as a vital  
10 function of a living body.

11 Q Now, Doctor, you said that the supply of  
12 blood to the brain can be inhibited by the  
13 swelling, is that correct?

14 A Yes, simply by mechanical pressure, because  
15 the expanding swelling brain pushes on the  
16 blood vessels that are on the surface of the  
17 brain and at the bottom of the brain,  
18 because the brain bulges toward and that  
19 traps in those blood vessels, and that's why  
20 you have necrosis. You have infarcts that I  
21 found in this particular case.

22 Q When you say the word "infarct", can you  
23 explain what infarct means?

24 A Infarct means basically necrosis meaning dying  
25 of tissue while someone is still alive.

1 Q That's a necrosis?

2 A That's the necrosis.

3 Q Now, infarct --

4 A Infarct is necrosis caused by blockage of  
5 blood supply.

6 Q Okay. Now, you said you did find necrosis in  
7 this little girl's brain?

8 A On both sides of the brain, yes sir.

9 Q Where in the brain?

10 A I can be more specific here. There were  
11 infarcts of both sides involving the front  
12 part of the halves of the brain, both the  
13 right and left half of the brain. There was  
14 additional area of infarct in the left  
15 temporal lobe, which would be lower part, I  
16 mean left lower part of the left half of the  
17 brain. And there was -- it was also this  
18 downward displacement of the middle part, the  
19 central part, of the brain that we refer to  
20 as diencephalon which was the result of this  
21 bulging, the herniation that I talked about.  
22 There were also thrombosis of the veins of  
23 the brain on the surface of the brain.

24 Q Thrombosis, Doctor, is a blood clot?

25 A Yes, it's clotting because circulation has

1 seized because of the physical pressure on  
2 those areas.

3 Q Okay.

4 A And there were also infarcts in both the  
5 right and left occipital lobes, that pertains  
6 to the back of both right and left half of  
7 the brain. Left half of the brain being in  
8 the back of the head and the right half of  
9 the brain, the back part was also infarcted,  
10 so those areas were infarcted as a result of  
11 pressure on the blood vessels at the base of  
12 the brain. Again, as a result of this  
13 downward bulging or herniation.

14 Q Doctor, what was the condition of the brain  
15 stem?

16 A The brain stem showed necrosis again as a  
17 result --

18 Q That's dying tissue?

19 A Dying tissue as a result of those pressures  
20 and impaired circulation.

21 Q Now, Doctor, what is the function of the brain  
22 stem?

23 A The function of the brain stem is to control  
24 general vital functions of breathing and the  
25 heart beat and maintaining someone basically

1           alive.

2           Q    If the brain stem becomes necrotic or full of  
3               necrosis here, what effect does that have on  
4               the person's ability to breath?

5           A    Well, that individual would be, for all  
6               practical purposes brain dead and they can  
7               only sustain breathing through artificial  
8               respiration, through mechanical apparatus  
9               that is brought in and pumps the air into  
10              the lungs on its' own. The person does not  
11              breath on his or her own.

12          Q    So, Doctor, is that what happened with Madison  
13               McBurney in this case, because of the infarct  
14               and the necrosis to the brain stem?

15          A    Yes, the necrosis to the brain stem is a  
16               consequence of the head trauma. Those changes  
17               occurred as a result of accumulation of blood  
18               over the brain. The brain got swollen, forced  
19               and bulged downward pressed to the brain stem,  
20               impaired the circulation throughout the brain.  
21               And then this child was artificially kept on  
22               ventilator for some days there, for I think  
23               for about five days or so.

24                       Obviously, there was no possibility of  
25               this child to breath on her own with this

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1 situation, so mechanical ventilation would be  
2 the only option. But, for all practical  
3 purposes, the person is dead.

4 Q Doctor, you also examined the eyes of this  
5 little girl?

6 A Yes.

7 Q What did you find?

8 A There was extension of the bleeding from  
9 subdural space into the -- and around optic  
10 nerves. And the left eye showed some broken  
11 blood vessels, which are known diagnostically  
12 in the clinical world as retinal hemorrhage.

13 Q Okay.

14 A There was -- I don't believe grossly that  
15 there was evidence of those in the right  
16 eye, but the left eye showed some.

17 Q Okay.

18 A And those are the result of impaired  
19 circulation and increased pressure within the  
20 head.

21 Q Now, Doctor, you did a microscopic examination  
22 of tissues of the brain, did you not?

23 A That's correct.

24 Q What did you find?

25 A I found those infarctions, the necrosis



1 throughout the brain and the structures.  
2 Kind of subsets of the brain, including the  
3 cerebellum in the brain stem and of course I  
4 examined the hard coverings of the brain  
5 which showed organizing subdural hemorrhage,  
6 but also showed on the special stains it  
7 takes that there was some evidence of  
8 remotely in those areas by the presence of  
9 blood pigment that was there in the layers  
10 of the tissue.

11 Q What does a remote hemorrhage mean?

12 A A remote hemorrhage means that something,  
13 some head trauma occurred, some months prior  
14 to the head trauma that led to the death of  
15 this baby. So, that would be an indicator  
16 that there was some injury back at some  
17 point in time.

18 Q Before this current injury?

19 A Before the current injury. Before the  
20 injury that complicated to the demise of the  
21 child.

22 Q Okay. Doctor, after completing your  
23 examination, including the neuropathological  
24 examination, did you come up with a diagnosis  
25 of what had happened to this child?

1 A Yes, sir.

2 Q What is that?

3 A This child died of a blunt force trauma of  
4 head and its' complications.

5 Q Now, when you say "blunt force trauma",  
6 Doctor, what does that mean?

7 A That means that there is a force applied to  
8 the head in blunt fashion, and that means  
9 that there is a force that changes the  
10 natural setting within the head and displaces  
11 the brain as a result of that to the point  
12 of tearing the blood vessels that are on the  
13 surface of the brain and these resulting in  
14 subdural hemorrhage. This is generally  
15 observed in circumstances where head is a  
16 booming object and strikes an unyielding  
17 surface.

18 Q Okay.

19 MR. WHITE: Just the word "unyielding  
20 surface"?

21 MR. SKRZYNSKI: Unyielding surface.

22 THE WITNESS: Unyielding surface. For  
23 example, if I demonstrate a person and throw  
24 the person into the wall, throw the person on  
25 the floor, that would be the unyielding

1 surface. And that would be if the back of  
2 the head impacts that unyielding surface,  
3 then the lag of the brain and displacement of  
4 the brain, because brain still has a little  
5 bit of space.

6 And, remember, I talked about this being  
7 a jelly-like substance, the brain will lag  
8 for maybe one-sixteenth of an inch and that  
9 sudden snapping movement will create ripping  
10 of those fine venous vessels on its' surface  
11 and result in bleeding into the subdural  
12 space.

13 BY MR. SKRZYNSKI:

14 Q Doctor, are the injuries that you found on  
15 autopsy consistent with the following  
16 hypothetical? Someone taking this child and  
17 throwing it two feet, from two feet away,  
18 into a crib and the baby hitting its' head  
19 against the wooden slats of the side of the  
20 crib?

21 A Yes, it's consistent with that.

22 Q Okay. So, Doctor, the cause of death in this  
23 case is?

24 A The cause of death was blunt force trauma of  
25 head and complications.

1 Q And the complications are all of the matters  
2 that you just talked about?

3 A The brain swelling, the herniations, and the  
4 brain necrosis which becomes incompatible with  
5 life.

6 Q All right.. Did you come to an opinion to  
7 within a reasonable degree of medical  
8 certainty about the manner of death in this  
9 matter?

10 A Yes, sir.

11 Q What is that?

12 A It was homicide.

13 Q Why is that, sir?

14 A Because, homicide is a category of death by  
15 definition is where death results from  
16 purposeful acts of another person occurs.  
17 And in order to generate this injury in this  
18 kind of child, this age, being 11 months of  
19 age, it had to be inflicted by someone else.  
20 This child could not self-create this type of  
21 injury.

22 MR. SKRZYNSKI: Okay. Thank you very  
23 much, Doctor, I have no further questions.

24 THE WITNESS: You're welcome.

25 THE COURT: Cross?

1 MR. WHITE: If I may, Your Honor.

2 CROSS-EXAMINATION

3 BY MR. WHITE:

4 Q So, if I am correct, Doctor, there are  
5 absolutely no external signs of injury on  
6 this child, is that true?

7 A Not that I detect.

8 Q Okay. Not a bruise, right?

9 A Correct.

10 Q Not a scrape?

11 A Correct.

12 Q Other than the lesions that were on the top  
13 of the head, a well nourished, healthy child?

14 A Correct.

15 Q And then the internal examination showed no  
16 fractures?

17 A Correct.

18 Q No fractures of any bone in the body or the  
19 head, correct?

20 A That is correct.

21 Q And also I believe your report indicates that  
22 there is no soft tissue injuries that you  
23 could detect either, correct?

24 A That is correct.

25 Q Specifically in the neck area?

1 A That is correct.

2 Q Okay. So, the blunt trauma, where did it  
3 occur on Madison, on her head?

4 A Based on the injury of head and the findings  
5 at autopsy it had to have been the back of  
6 the head.

7 Q Could you be a little bit more specific,  
8 Doctor?

9 A Anywhere in the back of the head.

10 Q Anywhere. And do you know how many times the  
11 blunt force trauma was -- occurred?

12 A At the minimum, once, and I can only  
13 consider that. Can I exclude some  
14 multiplicity? Theoretically, no. But, I can  
15 say that there is a minimum of one situation  
16 resulting in this damage. You have only one  
17 impact needed against the unyielding surface  
18 to create this type of damage.

19 Q So, but you did not find in your findings  
20 there was any more than one, did you?

21 A No, sir.

22 Q Okay. And the surface, do you have any  
23 opinion about what that surface was?

24 A Whatever the surface was, it was enough to  
25 not yield to complete continuation of

1 movement of the head. Whether it was  
2 somewhat padded or not I cannot tell. It's  
3 possible that it was at least partially  
4 padded by something, because I did not find  
5 any evidence of damage to the scalp itself.

6 Q Is that unusual, Doctor, to not find any  
7 evidence of damage to the scalp?

8 A Not in babies. I mean, if you are asking in  
9 general, an adult?

10 Q I'm talking about a child at this age.

11 A Yeah, in babies it's not unusual.

12 Q Is there any type of measurement that we  
13 could look to for you to guide us and tell  
14 me how much force was used to cause these  
15 injuries?

16 A No, the measure of the force is the  
17 occurrence of the damage. The damage -- the  
18 result, is the measure of the force. If the  
19 force is not enough, this damage does not  
20 occur. If the force is sufficient to create  
21 this deadly damage, it's there.

22 That is how the nature has set it up and  
23 there is no way by any mathematical or  
24 mathe-magical concept to try to calculate  
25 something and present. Many people have

1           tried to no avail, to no success.

2           Q     Okay. Would you adopt a version that I hear  
3                 on a repeated basis, force equivalent to a  
4                 child being thrown out of a 35 mile per hour  
5                 vehicle?

6           A     That's nonsense.

7           Q     Okay. Thank you.

8           A     You're welcome.

9           Q     So, the measurement is based upon the damage  
10                itself that was done, correct?

11          A     That is correct. If there is enough to  
12                create the damage, that's it. If there is  
13                not enough to create the damage, then we're  
14                not talking about the damage.

15          Q     And, Doctor, when did this blunt force trauma  
16                occur with respect to your examination on  
17                December 6th?

18          A     It would have been days prior to the time  
19                when I examined. I don't know exactly what  
20                moment of whenever and how long prior to  
21                what was reported this child being  
22                non-responsive. I cannot tell that with any  
23                specificity. It might have been within an  
24                hour, within longer than an hour, within  
25                minutes. I can't talk any specific day.



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1 Q Would you say within days -- would you say  
2 within days, within seven days?

3 A No, no, no, no, no.

4 Q Within five days?

5 A I mean, you are mischaracterizing. I am  
6 talking about the -- we all know as a fact  
7 that this child became non-responsive on a  
8 certain date. That there was E.M.S.  
9 arriving there. And, at that point in time,  
10 somewhere around that time, I don't know  
11 exactly when and how long prior to this child  
12 being non-responsive the injury occurred.  
13 But, it occurred somewhere around that time  
14 during that date. I don't know exactly when.

15 So, if you measure the time from that  
16 point when the child was reported  
17 non-responsive to the point I examined the  
18 child, considering that the child died on the  
19 fourth of December, and we know for a fact  
20 that the child was taken off the respirator  
21 on the fourth of December.

22 Q My question, though, is --

23 A Then we are talking about days, and I have  
24 answered your question.

25 Q My question, though, is from your examination

1 and your examination alone, can you tell the  
2 Court when the blunt force trauma occurred?

3 A When exactly?

4 Q Yes.

5 A No, I cannot provide the minute or the hour.  
6 I can estimate the day and that will be the  
7 day when the child became non-responsive.

8 Q But, that information you based upon the  
9 information you gleaned from the police  
10 reports and hospital records, correct?

11 A No, that is the information of the E.M.S.  
12 generated, and that's not the information by  
13 the way that was factored into this report so  
14 that we keep the record clear. That is the  
15 information you are asking me to factor in  
16 in giving you the interpretation or the  
17 answer to your question, sir.

18 Q And my question is excluding all of the  
19 external information that you received about  
20 the nature and circumstances of this young  
21 child's injury, could you tell by the  
22 examination alone on December 6th when the  
23 blunt force trauma occurred?

24 A On basis of just the examination of the body I  
25 could tell that it occurred days prior to my

1 examination.

2 Q How many days?

3 A That I cannot specifically say without  
4 knowing the external examination. And that  
5 is not something that is offered in a vacuum  
6 under any circumstances.

7 MR. WHITE: If I may approach the  
8 witness, Your Honor?

9 THE COURT: You may.

10 BY MR. WHITE:

11 Q I have an exhibit. Doctor, if I may  
12 approach and show you Defendant's Exhibit A  
13 and ask you have you ever seen that picture  
14 before?

15 (Defendant's Exhibit A, Photograph of Madison  
16 McBurney's crib, received and admitted in  
17 Volume I, introduced)

18 A I am not sure off the top of my head if I  
19 have seen this picture or not. I see  
20 thousands of pictures on a daily basis, but I  
21 see a crib here, sir.

22 Q I know, I just asked if you could remember.  
23 But, assume hypothetically that this was the  
24 crib of Madison and assume hypothetically that  
25 Madison was tossed into that crib from

1 approximately two feet away. Do you believe  
2 that that could have caused the injuries, the  
3 blunt force trauma impact that caused the  
4 hemorrhaging in her brain?

5 A Yes, sir.

6 Q Okay. Without making any determination of  
7 where she hit the pad or the wood or --

8 A Well, I see padding around and it is quite  
9 possible that the bedding was an intervening  
10 intermediary surface as the back of the head  
11 impacted the side of the crib. So, that's  
12 possible. That's possible based on the fact  
13 that there is no defined damage to the scalp  
14 itself, but that's all I can say.

15 Q Is it possible, Doctor, that the blunt force  
16 trauma was caused by the child hitting the  
17 padded mattress of the crib?

18 A Sure, that is possible. When throwing or with  
19 some additional force it all depends on the  
20 speed; speed of the moving head. And that  
21 speed creates the kinetic energy that is that  
22 transforming into the situation of brain  
23 lagging and causing the blood vessels to get  
24 ripped.

25 Q And if that person is standing approximately

1 two feet away from that crib, that child would  
2 have had to have been thrown up in the air  
3 to a certain extent and arched, is that  
4 correct?

5 A No, I don't see where your imagination is  
6 going there. This is not necessary. You can  
7 throw directly into the crib and that's the  
8 fastest way.

9 Q Okay. And assume --

10 A Unless you are offering some theory of  
11 something going up and down or something.

12 Q No, I am just asking a question Doctor, I am  
13 not offering any theory. Assume that the  
14 person standing at the crib with the baby,  
15 with Madison, and throws her into the crib  
16 which is approximately two feet away from the  
17 top of the crib, would that be enough force  
18 to cause the injuries that you found in  
19 examining her?

20 A This question doesn't make sense. I will  
21 explain why. You are saying, assuming that  
22 the person is standing next to the crib or  
23 at the crib, is that enough force. You are  
24 not giving me the source of the force to  
25 assess the force, you are just giving me the

1 position of the person standing at the crib.  
2 Sure, a person standing at a crib can cause  
3 this injury to the baby. But, the force  
4 that you are asking about has nothing to do  
5 with a person standing at the crib.

6 Q Well, I --

7 A I mean, it's not the logical setting.

8 Q The Prosecutor didn't give you the amount of  
9 force either.

10 A I am not talking about --

11 Q My question -- my question is --

12 A I am not even beginning, but you are  
13 mentioning force.

14 THE COURT: Gentlemen? Gentlemen?  
15 Let me be clear on how this courtroom works.

16 MR. WHITE: I'm sorry. I was just  
17 trying to help him.

18 THE COURT: I understand that, but  
19 there is a clear pacing to courtroom  
20 procedures. Counsel asks a question, witness  
21 responds to the question. Counsel let's  
22 witness finish the response and then asks  
23 another question. Witness waits until the  
24 question is completely asked before  
25 responding. If a witness is non-responsive

1 the objection is to me and I will deal with  
2 it. If Counsel gets interrupting the  
3 witnesses answer then I will interrupt the  
4 Counsel's questioning. Let us all be clear.

5 MR. WHITE: Maybe then the witness --

6 THE COURT: I have been very clear  
7 on what each person's role in this is.

8 MR. WHITE: And if the witness doesn't  
9 answer, I can offer --

10 THE COURT: Then you would direct to  
11 me as a non-responsive response.

12 MR. WHITE: And then are you going to  
13 interrupt the witness' response?

14 THE COURT: I will take care of --  
15 Counsel, how long have you been in my  
16 courtroom?

17 MR. WHITE: This is, I think, more  
18 than the second time.

19 THE COURT: Yeah. Yeah. You know  
20 how my courtroom works.

21 MR. WHITE: Thank you, Judge.

22 THE COURT: Allow me to operate it in  
23 the way that I do. Proceed.

24 BY MR. WHITE:

25 Q Can you answer my question, though, Dr.

1 Dragovic, from the person standing at the crib  
2 throwing the child into the crib hitting the  
3 padded surface, was that -- is that enough  
4 force to cause the injuries that you detected  
5 in your examination?

6 A It is a nonsense question, sir, because you  
7 don't assess the amount of force by the fact  
8 that the person is standing at the crib. All  
9 I can tell you is if the person is standing at  
10 the crib, it's possible to create this injury  
11 by throwing the child into a crib, but not  
12 talking enough or insufficient force, because  
13 it doesn't make any sense.

14 Q So, is it possible or not?

15 A Is it possible what?

16 Q That the injuries that you detected in your  
17 examination were caused by this child being  
18 thrown in a crib by the person -- a person  
19 standing at the crib --

20 A Sure.

21 Q Approximating -- and throwing her  
22 approximately -- I eye-ball that  
23 approximately two feet down?

24 A Sure, it's possible.

25 Q Into the padded surface?



1 A Into the padded surface, sure.

2 Q Okay. Doctor, was this a shaken baby? Was  
3 Madison a shaken baby?

4 A What?

5 Q Was Madison a shaken baby?

6 A I don't see any evidence of such a thing or  
7 entity here.

8 Q Thank you.

9 A You're welcome.

10 Q Now, we know that blunt force head trauma,  
11 was it the third leading cause of death in  
12 this country?

13 A We can check the statistics. And blunt force  
14 head trauma comes from everything, from  
15 traffic collisions, from assaults; sure.

16 Q Falls also?

17 A Falls, sure. If there are people walking down  
18 the street, they step on the ice, they fall  
19 and sustain head injury. People step on  
20 banana peel that is carelessly discarded on  
21 the street, they sustain the same kind of  
22 injury.

23 Q Sure. And because someone has suffered a  
24 blunt force trauma to the head doesn't  
25 necessarily mean it's non-accidental, correct?

1 A In general?

2 Q Yes, in general.

3 A In general, first every situation is assessed  
4 and investigated in order to see if it is  
5 untoward effect of some circumstances or if  
6 it is a result of purposeful act. Then one  
7 goes to conclude about the category of the  
8 manner how injury occurred. That's how I go  
9 about things. I don't call things  
10 non-accidental -- or these are -- the  
11 nebulous terms that are used in clinical  
12 medicine.

13 Q But, because you're examining someone that  
14 died as a result of blunt force trauma and  
15 complications, it doesn't necessarily mean  
16 there is a homicide, isn't that true?

17 A Well, this is why I am paid by the tax payers  
18 to investigate --

19 Q Isn't that true, Doctor?

20 A -- and to -- yes. Yes, it is true.

21 Q And blunt force trauma there is -- they look  
22 at the primary injury, isn't that true; the  
23 injury that occurs on impact?

24 A I am not following you.

25 Q Well, do you have any understanding of primary

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1 versus secondary injury in blunt force trauma  
2 cases?

3 A Primary versus secondary?

4 Q Uh-huh.

5 A I am not familiar with the terminology that  
6 you are using. Maybe you have something to  
7 share with me, so.

8 Q No, so you have never heard that term  
9 "primary versus secondary injury"?

10 A Well, I hear a lot of terms, but do they make  
11 sense that's a different thing.

12 Q No, I am asking you that term, sir.

13 A I am not --

14 Q Primary versus --

15 A I am not prepared to comment on that. If  
16 you show me something that you have there, I  
17 will comment on it.

18 Q Can you explain to the Court what hypoxic  
19 ischemic injury is?

20 A Sure.

21 Q What is it?

22 A Hypoxic means lack of oxygen supply. Ischemic  
23 means lack of blood supply. If you say  
24 hypoxic ischemic it means that there is a  
25 combination of lack of oxygen supply and

1 lack of blood supply. Well, you will then  
 2 have the question which one is which, because  
 3 there is lack of blood supply, and then if  
 4 there is lack of blood supply, there will be  
 5 lack of oxygen supply. There are instances  
 6 where you don't have a lack of blood supply,  
 7 but you have a lack of oxygen supply and  
 8 those are truly hypoxic injuries.

9 Q And was there a hypoxic ischemic injury to  
 10 Madison McBurney?

11 A Sure, there was plenty of it. We talked  
 12 about necrosis, we talked about infarcts, and  
 13 these are all those type of damages that  
 14 occur as complication of the trauma to the  
 15 head.

16 Q Correct. Those are the complications you are  
 17 referring to, Doctor, isn't that true?

18 A That is what is listed in the autopsy  
 19 protocol, sir.

20 CORRECTED

21 Q And the hypoxic ischemic injury doesn't  
 22 necessarily occur at the moment of impact,  
 23 isn't that true?

24 A Oh, that's true.

25 Q Okay. In fact, you could have trauma that is

1 not fatal, but becomes fatal because the brain  
2 swell continues to swell as a result of loss  
3 of -- lack of oxygen and lack of blood,  
4 correct?

5 A Correct.

6 Q And then a traumatic event that is non-fatal  
7 becomes fatal because the person is not  
8 properly oxygenated and blood supply is not  
9 properly motivated to the brain, correct?

10 A Well, no you have packed in something there.  
11 First of all --

12 Q My question is a yes or no answer, sir.

13 A And I can't answer this kind of question with  
14 a yes or no, sir. I have to clarify. If  
15 you allow me; if you don't, I can't answer  
16 the question.

17 Q So, did Madison suffer injury as a result of  
18 continued brain swelling after the initial  
19 traumatic impact?

20 A Of course she did.

21 Q Okay. And did she suffer injury as a result  
22 of a lack of oxygen to the brain?

23 A Among other things, yes.

24 Q Continued lack of oxygen to the brain?

25 A Sure.

1 Q Continued lack of blood to the brain?

2 A Lack of blood supply.

3 Q Blood supply, correct.

4 A Yes.

5 Q And that causes the brain to continue to  
6 swell?

7 A The brain first became -- at first it  
8 started to swell at the point when the injury  
9 occurred. As a result of brain swelling, it  
10 was compromised of blood supply and  
11 compromised of oxygen supply. So, the brain,  
12 the swelling of the brain led to these  
13 complications. It was not that these  
14 complications occurred before the brain  
15 started to swell.

16 Q But, we reduce the swelling or we curb the  
17 swelling by making sure that there is adequate  
18 oxygen and blood after the traumatic event,  
19 correct?

20 A I don't know how you do it. I don't know how  
21 your surgeons do it. They --

22 Q Is that a yes or no answer? I am not asking  
23 what I do.

24 A I can't answer that question, sir. It  
25 doesn't make sense to me.

1 Q Swelling is reduced by making sure that blood  
2 and oxygen are adequately provided to the  
3 person who has suffered the blunt force  
4 trauma, true?

5 A Possible.

6 Q And isn't it true, Doctor, that it's really  
7 the secondary part, the secondary injuries,  
8 that come as a result of loss of blood --,  
9 excuse me, to cause the brain to swell as a  
10 result of loss of blood and oxygen that  
11 ultimately lead to the fatality when a  
12 traumatic brain injury occurs, isn't that  
13 true?

14 A Loss of blood, sir?

15 Q Lack of blood and lack of oxygen that causes  
16 the brain to continue to swell that causes the  
17 fatality in traumatic brain injury cases,  
18 isn't that true?

19 A Only parts of it is true the way you put it.  
20 And if you want me to elaborate I can  
21 elaborate.

22 Q Please.

23 A As I explained earlier, any time there is  
24 trauma to the brain, the brain reacts by  
25 swelling. It is that swelling that prevents

1 the continuation of normal circumstances and  
2 normal environment for the brain. That  
3 swelling because it goes beyond the confines  
4 of the head itself impairs the blood supply,  
5 and by so doing it also impairs the oxygen  
6 supply. And then there is a combination of  
7 this ongoing process of oxygen deprivation to  
8 the brain and pressure on the structures  
9 that control the breathing, so that is how it  
10 happens.

11 I think your formulation is lacking  
12 something, and that's why I can't agree with  
13 it a hundred percent, and that's why I  
14 cannot answer yes or no, sir.

15 Q But, the ultimate brain swelling causes the  
16 herniation, correct?

17 A The ultimate -- well the brain swelling causes  
18 herniation. I am not sure what we are  
19 talking when we say "ultimate". The brain  
20 swelling starts the moment the head is  
21 injured or the brain is injured.

22 Q Impact, correct?

23 A Well, if there is an impact, yes. If there is  
24 oxygen deprivation by a pressure of the neck,  
25 you don't need an impact. Then the brain will



1 start swelling because of oxygen deprivation.  
2 So, you see there are multiple factors that  
3 are possible. We have to specify them and  
4 define them in order to keep the track of --

5 Q Are you familiar -- I'm sorry. Are you done?  
6 I'm sorry.

7 A Yes.

8 Q Are you familiar with the term "diffuse axonal  
9 injury"?

10 A It's called "diffuse".

11 Q Okay. "Diffuse axonal injury"?

12 A It's a misnomer.

13 Q Okay. But --

14 A I am familiar with that.

15 Q Did Madison McBurney suffer diffuse axonal  
16 injury?

17 A Not in the sense in which this is commonly  
18 used. There certainly was diffuse damage in  
19 the brain based on lack of oxygen supply and  
20 lack of blood supply, but not in the context  
21 where generally in literature people use  
22 diffuse axonal injury.

23 People use diffuse axonal injury to  
24 point out the mechanical damage to the  
25 brain; direct injury to the brain for which

1           there was no evidence in this case.

2           Q    Thank you.   And we certainly know that --  
3                assume hypothetically that the impact occurred  
4                approximately November 30th at a little bit  
5                after seven p.m., she did not pass until  
6                December 4th according to your recollection,  
7                isn't that true?

8           A    Well, she was shut down from artificial  
9                support on December 4th, sir.

10          Q    Okay.

11          A    The question is when the first signs of brain  
12                dead occurred, and that's -- that you can  
13                track in the clinical records.

14          Q    When did the first signs of brain dead --

15          A    I do not recollect off the top of my head.  
16                It is not important for me to know.

17          Q    And you certainly couldn't tell that from your  
18                examination, could you?

19          A    That is correct.

20          Q    And let me ask you this, Doctor --

21          A    Yes.

22          Q    -- was there a lucid interval after the  
23                impact of Madison McBurney?

24          A    I don't know.   I wasn't there when Madison  
25                McBurney sustained the injury.   Only the

1 individuals who were there could define the  
2 presence or absence of a lucid interval.

3 Q Okay.

4 A Is it possible? Sure. And was it there for  
5 a fact, I cannot tell.

6 Q What is a "lucid interval" for the Court's  
7 edification?

8 A Lucid interval is a situation where after  
9 sustaining a head injury one continues to  
10 demonstrate apparent well being and normal  
11 functioning.

12 Q And from your review of the U of M Hospital  
13 records, did Madison McBurney have a lucid  
14 interval?

15 A How could hospital records indicate that? I  
16 mean --

17 Q Do you know or not, sir?

18 A Number one, even if someone put it in the  
19 records, it would make no sense, because  
20 only an individual being there and being  
21 present could comment to a lucid interval,  
22 sir; no one else.

23 Q So, what's the answer to my question?

24 A I don't have an answer to your question, sir.  
25 Because, quite frankly to me it doesn't make

1 sense.

2 Q Okay.

3 A So, I can't answer yes or no.

4 Q Okay. Let me then dissect a little bit. You  
5 reviewed the U of M Hospital records, correct?

6 A Yes, back in January.

7 Q Okay. And from your review of the hospital  
8 records did Madison McBurney have a lucid  
9 interval?

10 A I have no clue.

11 Q Okay. Thank you. Now, you mentioned  
12 pursuant to the Prosecutor's questioning that  
13 the congenital condition regarding the scalp  
14 had no effect on your ultimate determination  
15 of whether this was a homicide or not, was  
16 that your testimony?

17 A It had nothing to do with head trauma or the  
18 manner of death, that's correct, sir.

19 Q Did you note in your examination, sir, that  
20 she had any kind of an infection in the  
21 skull, in the tissue in the skull, in the  
22 skin?

23 A No, sir.

24 Q Are you familiar with the term "MRSA", a  
25 bacterial infection abbreviated?

1 A Methicillin Resistant Staphylococcus Aureus?

2 Q Yes.

3 A Sure, yeah.

4 Q Any indication whatsoever during your  
5 examination of Madison McBurney that she was  
6 suffering from this bacterial infection?

7 A No, sir.

8 Q If she did, if she had that infection, would  
9 that impact your findings in any way?

10 A Well, if a person has staphylococcal infection  
11 in the body then it's pretty obvious when you  
12 look at the body, when you examine the inside  
13 of the body, if there is anything inside of  
14 the body. There is no consideration about  
15 that, so the answer is no.

16 Q My question is, assume that it was in her  
17 head, on her head and her scalp.

18 A I did not find any evidence of that, sir.

19 Q Okay. Any evidence of meningitis?

20 A No, sir.

21 Q Encephalitis?

22 A No, sir.

23 Q The thrombosis, the different areas of  
24 thrombosis and the veins, was there any  
25 indication, Doctor, that she suffered from

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1 blood clotting at or near the injury?

2 A No, no. These blood clots appear as a  
3 result of compromised brain function, sir.

4 Q Any indication, Doctor, that she had suffered  
5 a stroke at or near the injury?

6 A No.

7 Q So, we could agree, Doctor, that the fatality  
8 was not caused by a trauma itself, the actual  
9 fatal blow, but the complications that arose  
10 from it, is that a fair statement?

11 A No, it's not a fair statement, sir. The  
12 cause of death is specifically blunt trauma  
13 of head and complications.

14 Q So, then Madison died at the moment of impact?

15 A I didn't say so.

16 Q So, that's not a true statement. She did not  
17 die at the moment of impact, correct?

18 A Well, there is a difference in the question  
19 when the child died and what the child died  
20 of, sir. You can't mix them as mangos and  
21 papayas with apples and oranges. So, we  
22 have to separate those things, and once we  
23 separate those things then you can get a  
24 straight answer from me, because then I am  
25 able to provide the yes or no as you said.

1 Q All right. But, we would agree that she did  
2 not -- we agree that Madison McBurney did not  
3 die at the moment the blunt force trauma of  
4 her head, correct?

5 A That was obvious; yeah that's quite clear.

6 Q Correct. And she died later as a result of  
7 the complications, correct?

8 A That's correct. But, the complications would  
9 not have occurred had there not been the  
10 impact, sir.

11 Q Do you have an opinion, Doctor, whether she  
12 was properly oxygenated after E.M.S. arrived  
13 on the scene?

14 A None whatsoever, sir.

15 Q Okay. Do you have an opinion whether her  
16 I.C.P. and her cranial pressure was properly  
17 monitored at U of M?

18 A None whatsoever.

19 MR. WHITE: Thank you.

20 THE WITNESS: You're welcome, sir.

21 THE COURT: Redirect?

22 REDIRECT EXAMINATION

23 BY MR. SKRZYNSKI:

24 Q Doctor, I just want to cover --

25 THE COURT: Counsel, I would note that

1 recross -- Counsel, I note recross is a right  
2 not often allotted in this courtroom, so you  
3 should feel free to object to any redirect  
4 by the Prosecution that goes beyond the  
5 scope of your cross-examination.

6 MR. WHITE: Thank you.

7 THE COURT: Go ahead Mr. Prosecutor.

8 BY MR. SKRZYNSKI:

9 Q Doctor, you said that you saw no evidence of  
10 a shaken baby?

11 A That's correct, sir.

12 Q What would you look for to find that?

13 A Violent shaking as a concept dictates the  
14 finding of physical evidence of violent  
15 contact with certain parts of the body, and  
16 that would be the upper arms, the sides of  
17 chest, those areas.

18 Q What would you look for in those areas?

19 A Bruises, healing bruises.

20 Q And there was none of that here?

21 A That's correct, sir.

22 Q Okay. Retinal hemorrhaging, can that be a  
23 sign of shaking?

24 A I think that's -- that is being thrown out  
25 scientifically quite a bit ago. Retinal



1 hemorrhages accompany head trauma. Retinal  
2 hemorrhages accompany increased inter-cranial  
3 pressure. They accompany interior circulation  
4 in the eyes as a result of brain trauma or  
5 various other processes in the brain that  
6 include bleeding, spontaneous bleeds in the  
7 brain, or for blunt trauma of the brain.

8 So, retinal hemorrhages are not a  
9 specific pathognomonic or diagnostic finding  
10 of anything other than the altered situation  
11 in the circulation of the eye.

12 Q And that could be caused by the brain swelling  
13 as well?

14 A Oh, it can be caused by -- as a matter of  
15 fact, that was described first by Tirson  
16 back in at the end of the nineteenth century  
17 as a result of brain swelling reacting to  
18 hypertensive bleed in an adult.

19 MR. SKRZYNSKI: I have no further  
20 questions.

21 THE COURT: You may step down, Doctor.  
22 Thank you for your testimony, you're free to  
23 go about your business.

24 (The witness was excused 4:03 p.m.)

25 THE WITNESS: Thank you, Your Honor.

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1 MR. SKRZYNSKI: At this time, we would  
2 simply move -- Your Honor I want to mark as  
3 Proposed Exhibit Number Two, a certification  
4 of a document, which is the criminal case,  
5 the result of the criminal case in 1998 in  
6 Wayne County Circuit Court, the Third  
7 Judicial Court, where it sets forth the plea  
8 and conviction for Second Degree Child Abuse  
9 to which Detective Sumner testified during his  
10 testimony a couple weeks ago as to Mr.  
11 McBurney, and as a result of the treatment  
12 of the child in 1998, which he mentioned in  
13 his statement to Detective Sumner.  
14 (People's Proposed Exhibit Number Two,  
15 Certified Conviction from Wayne County  
16 Circuit Court from 1998 concerning Mr.  
17 McBurney, introduced at 4:03 p.m.)

18 THE COURT: Counsel, what is your  
19 position on the fact that he has proffered  
20 asking me I think to take judicial notice.

21 MR. SKRZYNSKI: I am offering this under  
22 803.8 Public Record and 902.4, which is the  
23 self-authenticated document.

24 THE COURT: Well, it may be both of  
25 those things, but it isn't also something I

1 can take judicial notice of flatly.

2 MR. SKRZYNSKI: It is; it is also.

3 MR. WHITE: But, it's not relevant to  
4 this case, so --

5 THE COURT: What's the relevance Mr.  
6 Prosecutor?

7 MR. SKRZYNSKI: It corroborates the  
8 testimony of Detective Sumner when he  
9 testified that the Defendant had admitted to  
10 shaking and man-handling his son in the 1998  
11 case, and knowing that he had caused  
12 injuries to that child in that case. And it  
13 also corroborates Detective Sumner's  
14 testimony that the Defendant ultimately pled  
15 guilty to Second Degree Child Abuse in that  
16 case.

17 MR. WHITE: I believe Detective Sumner  
18 testified that the statements of Steven  
19 McBurney were that he had Nicholas on his hip  
20 and bounced him too hard.

21 THE COURT: What he is essentially  
22 arguing is that he wants this to be seen to  
23 go through one of the elements that he is  
24 arguing about your client's knowledge.

25 MR. WHITE: I agree; yes.

1 THE COURT: And he is arguing, as I  
2 understand it, his previous legal experience  
3 with regard to injury done to a child and  
4 its' impact on his life would go to his  
5 knowledge if I understand his theory.

6 MR. SKRZYNSKI: That's correct, Your  
7 Honor.

8 THE COURT: Respond directly to that,  
9 because this is clearly something I can take  
10 judicial notice of, so it's only a question  
11 of relevance.

12 MR. WHITE: Sure, you can take  
13 judicial notice of it. The question is,  
14 that's Second Degree Child Abuse.

15 THE COURT: I agree. Basically, I  
16 see it as corroborative as he argued of the  
17 officer's testimony, that the Defendant did  
18 make some statements in regard to activities  
19 that resulted in him being convicted of  
20 Second Degree Child Abuse.

21 MR. WHITE: That doesn't have  
22 anything to do with knowledge. It's not  
23 relevant. This is an allegation of knowingly  
24 and intentionally causing serious physical  
25 harm.

1 THE COURT: The Prosecutor's request  
2 under advisement, it's clear that I can take  
3 it. I can receive this under taking judicial  
4 notice of an action of another court, I can  
5 receive the documents as a reflection of that.

6 MR. WHITE: Can I just give you a  
7 cite, CJI.2nd.17.20(3) the Standard to Find  
8 the Defendant Guilty of Child Abuse Second  
9 Degree, which that is a conviction of, a Plea  
10 of No Contest that Defendant did some  
11 reckless act.

12 THE COURT: I think the Prosecutor is  
13 arguing and the Defense arguing in this  
14 matter goes back and forth as to how the  
15 Court should view the prior actions of the  
16 Defendant with relation to the action that  
17 resulted in -- what the Prosecutor is  
18 attempting to establish was the murder of  
19 this child that day. I sort of lean the  
20 Prosecutor's way there, but I want to think  
21 about that one.

22 So, it's clear on this matter that I can  
23 take judicial notice of it, I am going to  
24 hold it under advisement as I sort of think  
25 on this a little bit more. Go ahead, Mr.

1           Prosecutor.

2           MR. SKRZYNSKI: In addition, Your Honor,  
3           I have marked as People's Proposed Exhibit  
4           Number Three, records from Children's  
5           Hospital of Michigan which document the  
6           admission of Nicholas Kennedy who was the  
7           victim in the 1998 abuse case. And it shows  
8           an admission date of 2/27/98, and subsequent  
9           discharge date as well; I can't see what that  
10          is. But, it documents -- I am submitting  
11          both pages of that record. Counsel has  
12          indicated that he would stipulate to the  
13          business record foundation so that the keeper  
14          of the records at the Children's Hospital is  
15          not necessary to be here to testify that  
16          these are medical records kept in the normal  
17          course of the business of the hospital.

18          And I am asking for admission of four  
19          pages; the face sheet of the case, which  
20          identifies the patient, and three other  
21          documents which indicate the discharge  
22          summaries of the patient, and document the  
23          injuries that were suffered by Nicholas  
24          Kennedy in 1998 to which the Defendant  
25          admitted he had committed or caused when he

1 spoke with Detective Sumner. These are  
2 offered to demonstrate the knowledge of the  
3 Defendant regarding the serious injuries that  
4 can be caused to an infant upon rough  
5 treatment of that infant.

6 It is offered to show his knowledge,  
7 because one of the elements of First Degree  
8 Child Abuse which is predicate felony for the  
9 felony murder case is that he must knowingly  
10 or intentionally inflict serious harm;  
11 serious injury to the victim. And this shows  
12 that he does know that serious harm can  
13 result from such rough treatment. And  
14 certainly throwing a baby two feet away into  
15 a crib, banging its' head constitutes that  
16 kind of rough treatment for which he knows  
17 that serious injury can result.

18 I am offering this to demonstrate his  
19 knowledge, and I am offering it under the  
20 business records exception, and pursuant to  
21 the memorandum that I wrote to the Court and  
22 the new case that I cite for the Court  
23 today, the case of Kirtdoll, a Michigan  
24 Supreme Court case from 1974. I am also  
25 arguing that this business record does not

1           infringe on the Defendant's Sixth Amendment  
2           Right to confront the witnesses under the  
3           analysis of U.S. Supreme Court in the  
4           Washington against Crawford case.

5           (People's Proposed Exhibit Number Three,  
6           Records from Children's Hospital re: 1988  
7           case re: Steven McBurney, introduced)

8           THE COURT:           Thank you.    Response?

9           MR. WHITE:           First of all, Judge,  
10          regarding the statements that Mr. McBurney,  
11          my client, admitted to causing specific  
12          injuries to Nicholas Kennedy in March of  
13          1998, that's absolutely not founded in the  
14          record.   The statements by the police  
15          officer were that Mr. McBurney admitted  
16          bouncing Nicholas on his hip, shaking him,  
17          and causing injuries.   The specific date of  
18          interview was March 2nd, 1998.   Some of the  
19          -- three of the documents that the  
20          Prosecutor seeks to admit are not dated until  
21          the day after.   That's a correction of the  
22          factual record.   The legal argument, though,  
23          is does the admission of these documents  
24          violate my client's right of confrontation  
25          under the Sixth Amendment, and I believe it



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1 does. Because, in that case, the balance --  
2 the medical records will show that on  
3 February 27th Nicholas was admitted, on  
4 February 28th there was a report made by a  
5 doctor that suspected child abuse and that  
6 report then was sent to F.I.A. to begin  
7 their investigation. And the documents that  
8 are -- and from that point on, from February  
9 28th, 1998 through his discharge date of  
10 March 3rd, are littered with references to  
11 medical and legal terms substantiating child  
12 abuse allegedly at the hands of Mr. McBurney  
13 for the purpose of ultimately proving the  
14 case by the Family Independence Agency, Child  
15 Protective Services Unit, and ultimately the  
16 Wayne County Prosecutor's office.

17 Once that report was made of suspected  
18 child abuse, it certainly was within that  
19 definition of Crawford that says statements  
20 that were made under circumstances that would  
21 lead an objective witness reasonably to  
22 believe that the statement would be available  
23 for use at a later trial.

24 Certainly, Judge, other than page one of  
25 the Prosecutor's Proposed Exhibit, which is

1 the admission record, the other three pages  
2 are the discharge summary. All three of  
3 those other pages made after this report of  
4 suspected abuse, made after Detective Sumner  
5 provided a plethora of information, which is  
6 clearly reflected in the records, were made  
7 in anticipation -- would it be reasonable  
8 for a person to assume that their findings  
9 were going to be used in a child abuse case  
10 later at trial and in a Prosecutorial sense?  
11 Absolutely Judge.

12 Now, the case of The People versus  
13 Lonsby, 268.Mich.Ap.375, now that  
14 specifically has to do with a crime lab  
15 work-up that was introduced into evidence  
16 under the business records exceptions. And  
17 the person who did the work-up did not  
18 testify; it was barred. But, on page 391 of  
19 Lonsby, there are notations and out-of-court  
20 cases, People versus Hernandez out of New  
21 York, Los Vegas versus Walsh, People versus  
22 Rogers out of Pennsylvania -- excuse me, New  
23 York, and the Commonwealth versus Carter out  
24 of Pennsylvania, all have to do with medical  
25 legal tests.

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Medical tests in the sense that they are being conducted in a medical setting, but ultimately for a legal purpose. And this clearly on all of those cases, those tests were held in violation of the accused Sixth Amendment Right. And this is the same in this case. You have medical tests being done for the purpose of ultimately a legal process, and I believe that the discharge, the three pages, which include references to medical/legal terms are clearly in violation of my client's rights under Crawford. So, I think that they should be -- and I request that they should be excluded.

THE COURT: Response?

MR. SKRZYNSKI: Your Honor, Crawford talks about statements that are testimonial, and the Court cites a long history of those kinds of statements. And the Court talks about things like depositions given before Magistrates, talks about statements being taken by police, it talks about ex-parte examinations of people taken by officials. In other words, it talks about statements that are made in an official capacity

1 designed specifically to accuse.

2 The statements that are contained in  
3 these medical records are diagnosis of a  
4 condition of a sick child that is brought  
5 into a medical facility that is designed to  
6 do medical work. The cases that the Defense  
7 cites have to do with crime labs, police  
8 crime labs, that are doing work for the  
9 police in --

10 THE COURT: I am aware of what he is  
11 talking about.

12 MR. SKRZYNSKI: All right. That's not  
13 what is going on here. The -- another thing  
14 the Court says is that the information can  
15 not have been gleaned in an adversarial  
16 process. The examination of a sick child by  
17 a doctor for purposes of diagnosing what the  
18 problem is and treating the problem is not  
19 information that is gleaned in an adversarial  
20 circumstance. It's a medical circumstance,  
21 they are making medical findings.

22 I cite to the Court several cases, only  
23 one of which is published. But, these are  
24 instructive cases, these have to do with the  
25 admission specifically of hospital records

1           that have to do with diagnosis of physical  
2           conditions. And, in those cases, the Court  
3           said that these -- in each of the cases, the  
4           Court says that the findings in those  
5           medical records are not the kind of  
6           testimony that the Court in Crawford is  
7           addressing. The ex-parte examinations by  
8           Magistrates or Police Officers, the context  
9           in which they are done is designed to  
10          diagnose a problem and to give medical  
11          treatment. That's exactly what these records  
12          -- now I have redacted any reference to how  
13          these injuries occurred. But, the injuries  
14          themselves are the product of physical  
15          examinations of a physical body. The  
16          Court in The People against Miller case, the  
17          unpublished Court of Appeals case which I  
18          gave to the Court, talked about a medical  
19          examiner who was allowed to testify to the  
20          findings of some neuropathologist to who he  
21          had submitted brain tissue that he obtained  
22          from an autopsy that he was performing. And  
23          those neuropathologists had done a study of  
24          that brain tissue, come up with some  
25          opinions, submitted that back to the medical

1 examiner, and he incorporated those medical  
2 opinions into his own and gave his opinion  
3 about the cause and manner of death. And  
4 the Defendant objected and said that him  
5 testifying to those medical records that were  
6 submitted by the neuropathologist was a  
7 violation of the Sixth Amendment Right to  
8 confront those neuropathologists.

9 The Court in that case said, look, these  
10 were physical observations made by doctors on  
11 real physical evidence, and done at the  
12 request of another doctor to diagnose the  
13 cause of death, the actual physical reasons  
14 that the person died. And the Court in that  
15 situation held that these statements from  
16 these neuropathologists were not testimonial  
17 statements. They were not the kind of  
18 statements that the U.S. Supreme Court was  
19 concerned with in Crawford. The type of  
20 ex-parte examinations by people in  
21 adversarial settings and litigious settings,  
22 these were observations made by doctors on  
23 tissues that they were examining. And the  
24 Court pointed out that these are not  
25 Affidavits, these are -- this was physical

1 observation of physical evidence.

2 And for that reason the Court in Miller  
3 said, this is not a violation of his Sixth  
4 Amendment Right to Confrontation, these  
5 reports of neuropathologists are not  
6 testimonial as the Crawford case was  
7 concerned with.

8 Likewise, in this case, these records from  
9 Children's Hospital document the physical  
10 injury that this child had based on physical  
11 examinations by the doctors in a medical  
12 context for a medical purpose. Those things  
13 are analogous to the neuropathology opinions  
14 that were submitted in the Miller case, which  
15 the Court said were not testimonial.

16 There are several other cases that I  
17 cite. Specifically, there is a case called  
18 Brown, Commonwealth against Brown, it comes  
19 from Virginia. It is an unpublished case,  
20 too, but I think that its' reasoning is  
21 instructive. In that case, the Defendant is  
22 charged with Rape and several other related  
23 charges. And the victim in that case was  
24 examined by a S.A.N.E. Nurse, s-a-n-e, and  
25 that's -- S.A.N.E. stands for a certain type

of nurse, but it's a nurse examiner who is like a forensic examiner. And the Court -- the Prosecutor in that case offered the report of the S.A.N.E. Nurse who had examined the rape victim because that nurse had died. And so the Prosecutor was just offering that report; he had redacted all of the opinions of that nurse, and what was left was simply the physical observations that the nurse made. And the Court in the Brown case said that the physical examinations were not the type of thing that Crawford was concerned with. The Court said the fact that is identified in Crawford that would compel to suppress the evidence are not present. The report contained no accusations, just like the medical records here. It was the result of physical examination of the victim, that's exactly what the report here is. It reports the injuries, that's what this report does. It does other things; indicate the tissue and the biological samples taken, and these things were submitted for laboratory analysis. The Court says that these were not



1 derived from information gathered in an  
2 adversarial setting. And that's exactly what  
3 we have here. This is not information  
4 gathered in an adversarial setting.

5 In that case, the Court said, for the  
6 reasons stated we find that the same report  
7 as redacted does not implicate the Sixth  
8 Amendment concerns raised in Crawford, and  
9 they allow that it should have been let in.  
10 So, you can say the same things about the  
11 hospital records that are here in this case.

12 In addition to that, that Court, the  
13 Virginia Court, cited a New York Court in a  
14 foot note and stated on page four of four,  
15 the copy that I gave you, it said the use of  
16 these records as evidence in a homicide case  
17 does not mean that they were composed for  
18 that adversarial purpose, or that their use  
19 by the Prosecution is the inevitable  
20 consequence of their composition.

21 Obviously, criminal cases involve the  
22 use of medical reports all the time. But,  
23 just because ultimately a Prosecutor may use  
24 it in order to get evidence against the  
25 Defendant doesn't mean that that was the

1 purpose for which it was created. Crawford  
2 is concerned about the purpose for which  
3 statements are made. It can't be said in  
4 this Children's Hospital record that the  
5 statements of these doctors, the diagnosis of  
6 the injuries to the child that were made were  
7 done for the purpose of giving evidence in a  
8 criminal case. The fact that they are  
9 incidentally used for that purpose doesn't  
10 mean that that's why they were created.

11 And the whole question in Crawford is  
12 why the person is saying what he is saying.  
13 That's what makes the person either  
14 trustworthy or not. That's what makes the  
15 person someone who the Defense has to  
16 cross-examine versus someone that they don't,  
17 because what they are saying is trustworthy.

18 The Court has also said that -- I cited  
19 the case of United States against Garner,  
20 that's a Federal Court of Appeals from the  
21 Sixth Circuit; that's our Circuit. And  
22 that's unpublished, but the Court there it  
23 cited to a case called the United States  
24 against Kromer, and in that case the test  
25 was whether the declarant intends to bear

1 testimony against the accused. That intent  
2 may be determined by whether a reasonable  
3 person in the declarant's position would  
4 anticipate a statement being used against the  
5 accused in investigating and prosecuting the  
6 case. And the Court there said about the  
7 records that were offered there, the records  
8 at issue were prepared at the Defendant's  
9 request. The physicians involved were not  
10 preparing the reports in the context of a  
11 criminal prosecution, and had no reason to  
12 anticipate that their statements were being  
13 used against the Defendant.

14 The introduction of these non-testimonial  
15 medical records thus did not violate Garner's  
16 rights. This is the Sixth Circuit talking in  
17 our own jurisdiction. The case here is very  
18 similar.

19 Finally, in the case of Richardson  
20 against the State, this is an Indiana Court,  
21 again unpublished, but instructive. The  
22 Court there said that -- it cited the  
23 Crawford case and said that the Supreme  
24 Court did comment on existing hearsay  
25 exceptions stating most -- this is Judge

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1 Scalia's words, most hearsay exceptions,  
2 covered statements, that by their nature were  
3 not testimonial; for example, business  
4 records. And that's exactly what we have  
5 here. The Court in that case went on to say  
6 that we find no persuasive reason pointed to  
7 by the Defendant to cause us to disagree with  
8 the Supreme Court's Rule as stated in  
9 Crawford that business records by their very  
10 nature are not testimonial.

11 So, to begin with, because this is a  
12 business record from Children's Hospital, it  
13 is by it's very nature even under Justice  
14 Scalia's view to be not testimonial. And it  
15 doesn't offer any ex-parte statements that --

16 THE COURT: Actually, I thought that  
17 that was Roberts -- not Roberts, I'm sorry,  
18 Renquist's position rather than Scalia's.

19 MR. SKRZYNSKI: Well, you could be right.  
20 You are right. I think you are right.  
21 Anyway, it came out of the Crawford case  
22 itself.

23 THE COURT: It did.

24 MR. SKRZYNSKI: And it mentioned that  
25 these are business records -- are usually not

1           testimonial. And there is nothing -- again,  
2           I could submit records which have hearsay  
3           inside of them and that may lead to  
4           objection, and there has to be separate  
5           hearsay exceptions. In those cases -- in  
6           those quotes inside of business records have  
7           to be analyzed in terms of Crawford, too.  
8           But, that's not what I am offering here. I  
9           am specifically offering only the diagnosis  
10          of the injury that the child had.

11                 Again, these are medical impressions of  
12          physical findings. The Miller Court has said  
13          -- all these courts have said the same thing,  
14          that that kind of testimony when you are  
15          talking about diagnosis, the actual physical  
16          findings that come from a physical body,  
17          that's not the kind of testimony that is  
18          considered testimonial under Crawford. That  
19          doesn't implicate the Sixth Amendment. It  
20          doesn't offend the Sixth Amendment. And,  
21          again, I urge the Court to read the Kirtdoll  
22          case, that was the case in 1974 --

23                 THE COURT:           I have read what you  
24          have given me.

25                 MR. SKRZYNSKI: Okay. But, it did analyze

1 specifically hospital records in relation to  
2 the Sixth Amendment's confrontation clause,  
3 and said that they are admissible, they don't  
4 offend, and cited a number of reasons why.  
5 And they did, like I said, that whole  
6 analysis was in light of the Sixth  
7 Amendment's confrontation clause. So, that's  
8 -- our Supreme Court ruled on that and they  
9 came to about the same conclusion regarding  
10 business records, and for the reasons that  
11 were stated in those -- in that opinion.

12 That opinion states -- it also cites  
13 Wigmore on evidence and another very famous  
14 treatise on evidence in which those  
15 professors commented the reason that those  
16 records are reliable and could be business  
17 record exceptions to the hearsay rule is  
18 because a doctor in treating a patient, that  
19 the patient's health, the patient's life may  
20 depend on the -- not only the accuracy of  
21 the doctor's observations, but in his  
22 accuracy in recording it so that other  
23 doctors who would also be treating that  
24 patient, but who can't talk to the original  
25 doctor, would have access to the correct

1 information. It's vital information that's  
2 got to be right in order to treat the  
3 patient.

4 It's not information that is designed to  
5 convict the Defendant or to help the  
6 Prosecutor. It is information that is  
7 designed to treat the patient. And so it's  
8 totally different from the testimonial  
9 evidence that Crawford is concerned about and  
10 rightfully so.

11 And for those reasons, Judge, I think it  
12 does not offend Crawford, it is a business  
13 record exception and it does have relevance  
14 in this case in that it reflects the  
15 Defendant's knowledge of the seriousness of  
16 the injuries that can be caused by the  
17 maltreatment of an infant. And for all those  
18 reasons I ask that the Court allow them in.

19 THE COURT: Response.

20 MR. WHITE: I think the problem lies  
21 is that the People would like to suggest to  
22 the Court that the medical records being  
23 proffered are antiseptic, they are merely for  
24 showing medical condition; and that's hardly  
25 the case, because if it was merely offered

1 to show the medical condition of a child then  
2 there would have never been any police  
3 involvement with the hospital or hospital  
4 personnel making statements about what Mr.  
5 McBurney allegedly said. And they certainly  
6 wouldn't have been a referral to the Family  
7 Independent Agency regarding suspected child  
8 abuse. And there certainly wouldn't have  
9 been a referral to the Prosecutor, the local  
10 Police Department, regarding a child abuse  
11 investigation; all which occurred prior to  
12 the last three pages of the Prosecutor's  
13 Proposed Exhibit occurring.

14 At the point of the referral, it became  
15 not only a medical process, it became a  
16 prosecutorial process also. It became a  
17 child abuse prosecution. It became  
18 inseparable. You cannot say that it was  
19 merely for medical purpose. The Prosecutor  
20 generously offers to redact alleged  
21 statements made by my client, but it is so  
22 permeated in the documents that they seek to  
23 introduce that you cannot redact it, Your  
24 Honor. You cannot.

25 You cannot redact medical legal terms in



1 its' use by doctors. You cannot say, "Well  
2 it was merely for examination and medical  
3 purpose", because the whole purpose of the  
4 documents being prepared -- excuse me, not  
5 the whole purpose, but a primary purpose was  
6 for a prosecution for child abuse, not just  
7 treatment of a child.

8 The cases -- the Miller case that the  
9 People rely on has to do with consulting  
10 neuropathologist's report that the  
11 neuropathologist did not testify, it was  
12 referred to by another pathologist as part of  
13 the People's case and they said that is not  
14 testimonial. But, you should also note  
15 Judge, that is an unpublished opinion and  
16 that the Court --

17 THE COURT: I do know that.

18 MR. WHITE: The Court held that it's  
19 dicta anyway since the Defendant's expert  
20 witness relied on the same report to make his  
21 findings and conclusions to the Court. So,  
22 that really has no, you know, preferential  
23 value to the Court.

24 The case in which the same report was  
25 made, the rape kit by the nurse, redacted

1 from that report where the doctor's opinions  
2 and statements allegedly made by the victim  
3 and we don't have that either. So, this is  
4 not just merely a medical diagnosis, there is  
5 medical legal terms being proffered to the  
6 Court that go beyond treatment and diagnosis.

7 The Miller -- excuse me, the Sixth  
8 Circuit Court case, the Garner case, was the  
9 woman's own medical records that were being  
10 offered by the Prosecutor to show that in  
11 her claim that she had worked for the Post  
12 Office and then she took a disability and  
13 that was to refute her own claim that she  
14 was disabled at the time she was taking  
15 benefits from the Post Office and working on  
16 the side. It had nothing to do with any  
17 prosecution whatsoever.

18 In each one of the cases that are cited  
19 and Lonsby being the footnote, the  
20 out-of-state cases, there was a medical  
21 purpose and there was a legal purpose. The  
22 collecting of blood in Los Vegas versus  
23 Walsh. A blood test in People versus  
24 Rogers, and excuse me in Commonwealth versus  
25 Carter it has to do with a test regarding

1 presence of drugs; a combination  
2 medical/legal, and that's exactly what we  
3 have in this case Judge.

4 You can see from the testimony of the  
5 medical examiner in this case that one's  
6 diagnosis about injuries is subject to a  
7 variety of different interpretations and  
8 that's why the right under the Sixth  
9 Amendment to confront the witness against you  
10 is so important, because what is given face  
11 value may not have that kind of substance  
12 behind it. And so if the Prosecutor thought  
13 it was so absolutely necessary as part of  
14 this case that the doctor's diagnosis in the  
15 prior case come in, then why wasn't the  
16 doctor presented so we could cross-examine  
17 that doctor. Because, remember he is saying  
18 that he is using a prior case, the People  
19 are saying they use this prior case to show  
20 knowledge.

21 The prior case involves conviction to a  
22 reckless act, not intentional and purposeful  
23 harm. So, I can't see how that would  
24 support the People's position. The medical  
25 support for the position that there was an

1 intentional act in the 1998 case certainly  
2 would be subject to cross-examination as it  
3 was and it should have been in this case  
4 also. So, Your Honor, to say that we can  
5 have this admitted to show knowledge when  
6 knowledge was not the component in the prior  
7 case, but use it to show knowledge in this  
8 case without having the right to  
9 cross-examine that critical witness I don't  
10 believe comports with our Constitutional  
11 Rights.

12 And, I believe, under the Michigan Court  
13 of Appeals, this jurisdiction's  
14 interpretation of Crawford in this state even  
15 though there is not a case directly on point  
16 that I can find, the combination of the  
17 medical legal part of it renders it  
18 excludible under Crawford.

19 Again, once the referral was made, which  
20 was mandatory, then it became a legal case  
21 also. And, is it conceivable that the  
22 statements that were made under circumstances  
23 would lead an objective witness reasonably to  
24 believe that the statement would be for use  
25 -- used later at trial is certainly within

1           that definition. The discharge summary, the  
2           last three pages, are clearly within that  
3           definition. There was going to be a child  
4           abuse proceeding, there was going to be a  
5           child abuse prosecution, and that was part of  
6           the reason it was being prepared.

7           MR. SKRZYNSKI: Judge, could I just  
8           respond to one thing he is saying?

9           THE COURT:           Sure.

10          MR. SKRZYNSKI: Because, he has a clear  
11          misunderstanding of -- and I don't know why,  
12          but he has a clear misunderstanding of what I  
13          am trying to offer these records for. I  
14          keep saying to you, and I hope he hears it  
15          this time, that the knowledge I am talking  
16          about --

17          MR. WHITE:           Wait, wait, I -- wait --

18          THE COURT:           All right.

19          MR. WHITE:           It's nothing personal.

20          THE COURT:           Whether he understands it  
21          or not, I guess, is unimportant to me.

22          MR. SKRZYNSKI: All right.

23          THE COURT:           It is whether I  
24          understand.

25          MR. SKRZYNSKI: All right. The knowledge

1 I am talking about has to do with the  
2 knowledge of the seriousness of the injury.  
3 It has nothing to do with the intentional or  
4 unintentional act. And the fact that the  
5 Second Degree Child Abuse doesn't involve an  
6 intentional act is irrelevant; it involves  
7 serious injury.

8 The knowledge I am imputing to the  
9 Defendant through his prior experience in  
10 doing the same -- a similar kind of thing, is  
11 the knowledge that he will cause a serious  
12 injury; that's all. Not that he is doing an  
13 intentional act. It's that he knows he is  
14 going to cause a serious injury.

15 Furthermore, the other point I wanted to  
16 make is that when a crime lab is doing a  
17 report they are doing it at the behest of  
18 the police. The taking of blood in these  
19 other cases was done at the behest of the  
20 Prosecutor in order to aid the prosecution.  
21 And you can't possibly say that just because  
22 somebody at the hospital filed a 3200 form  
23 with the -- well whatever entity it was at  
24 that time, makes this a legal case as far as  
25 the doctors are concerned, and that they may

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1 skew their diagnosis or they may falsify  
2 their diagnosis in order to convict the  
3 Defendant.

4 I mean, that's basically what we're  
5 saying. That if they are making this  
6 statement to the police at the request of  
7 the police in order to help investigation of  
8 the case or help to prosecute the Defendant,  
9 the worry is in Crawford and elsewhere that  
10 they are going to skew their testimony.  
11 That their testimony is not reliable, because  
12 the police are involved, they are making  
13 their statements for the police.

14 Just because somebody got Social Services  
15 involved in this case doesn't mean that the  
16 diagnoses that were being made of this child  
17 by these doctors was done at the behest of  
18 the Police.

19 As I quoted that Brown case, the Brown --  
20 Commonwealth against Brown case, they cite a  
21 New York case that said just because  
22 eventually somebody's medical report might be  
23 used as an exhibit doesn't mean that that's  
24 why it was created. It is used incidentally  
25 as an exhibit, but the main reason it's

1 created is to help to diagnose and treat a  
2 medical condition. That's the important  
3 part, and that's why it's reliable, that's  
4 why it's not testimonial.

5 THE COURT: Reliability is no longer  
6 the test under Crawford, Hammond, and Davis.

7 MR. SKRZYNSKI: I understand.  
8 Testimonial is; but that's why it's not  
9 testimonial is because it's not done in an  
10 adversarial condition, it's not done by an  
11 official Magistrate or an official, it's not  
12 done in that kind of a context.

13 THE COURT: Nine-one-one (911)  
14 operator is not a Magistratical Official  
15 position either. All right, this matter  
16 comes before the Court on the admissibility  
17 of documents and an objection based on the  
18 new doctrine that has come out of a series  
19 of cases out of the United States Supreme  
20 Court that sort of in short hand, and I  
21 think by a number of people, is Crawford,  
22 Hammond, and Davis. It's Washington versus  
23 Davis, and Indiana versus -- or I'm sorry,  
24 Washington versus Crawford, and I think it's  
25 Indiana versus Davis; or perhaps Washington



1           versus Davis.

2           It's real clear to me that the Supreme  
3           Court in that has changed the ground works  
4           of confrontation in this country. The old  
5           Robert's Test is clearly dead; just  
6           absolutely dead and reliability is not the  
7           issue. And I don't think any Court that  
8           makes a ruling and uses the old Davis  
9           language of reliability will be sustained in  
10          its' analysis. It may ultimately be  
11          sustained in its' result, but not in its'  
12          analysis.

13          It's equally clear to me that Crawford  
14          and Hammond and Davis do not in any way,  
15          shape, or form define what the Supreme Court  
16          has meant by this, and that it is going to  
17          take years to figure it out, because in just  
18          a simple review of the cases in this area,  
19          some of which were cited by Counsel; your  
20          Courts are all over the map. The analysis,  
21          and I have read some of it just in  
22          preparation for this, it's just everywhere.

23          There doesn't seem in my research to be  
24          any case dealing with hospital medical  
25          records that I can find that are post

1 Hammond/Davis that have any analysis that is  
2 worth citing on this record, and I really  
3 don't think that Counsel has provided me any  
4 that I would regard dealing with the issue  
5 that is right squarely in there. And I  
6 think both the Prosecutor and Defense Counsel  
7 have touched on it, and I think the  
8 Prosecutor has clearly seen it in his  
9 argument that the question under Davis is how  
10 far does it extend when it comes to the  
11 question of confrontation and individuals.

12 I think it's fairly clear to say that a  
13 statement to a family member doesn't fall  
14 under the current doctrine that this Court,  
15 at least as far as I understand, that a  
16 Police Officer, an extension of a Police  
17 Officer clearly does. A 911 Operator is the  
18 core of the Davis case.

19 I think a fair way, one of the fair ways  
20 one could define the limitations of Davis, is  
21 that it applies to individuals who work for  
22 the government. I would think lab reports,  
23 autopsies, those such documents when prepared  
24 by government in the course of either legally  
25 mandated acts that could result in use at

1 criminal prosecutions, I believe really  
2 clearly fall within the reasoning of this.

3 Any question about that? Ultimately, I  
4 may prove to be wrong, but I don't think how  
5 you cannot read those string of cases and  
6 not clearly come to an understanding that  
7 investigatory work that is either legally  
8 mandated or done in preparation of criminal  
9 investigation fall within that purview.

10 There is a series of cases that say it,  
11 but I recognize that if there is a series of  
12 cases that go the other way. There is a  
13 series of cases on laboratory reports and  
14 they are all over the map. But, if you read  
15 them, and I have, I am persuaded that the  
16 Supreme Court's decision in State versus  
17 Birchfield, it's an Oregon Supreme Court  
18 decision that holds that a lab report without  
19 the testimony of the person preparing it is  
20 violation of confrontation. The reasoning on  
21 that is just powerful.

22 Whereas, if you look at the Supreme  
23 Court's decision in People versus Cage it  
24 goes exactly the opposite way. At best, I  
25 think can be characterized as highly into

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1           confusion that comes out of this. If you  
2           look at this, the Court in trying to  
3           interpret Davis found that the statements  
4           were non-testimonial, because the doctors  
5           were not coordinated in their testimony with  
6           law enforcement. Even though they clearly  
7           had an understanding of what they were doing  
8           could be used by law enforcement. And they  
9           rely on this sort of structure versus  
10          non-structure argument that has arisen since  
11          Davis and I just don't see that that argument  
12          -- I don't see how you call a 911 call which  
13          is the analysis that the Supreme Court  
14          brought to Bear, a structured environment, I  
15          don't see this. So, as I look at this, I  
16          see a great deal of confusion out there.

17                But, there is one thing that strikes me  
18                about the California decision that I think I  
19                have to deal with in this case. The Supreme  
20                Court holds that Davis doesn't extend, and I  
21                am speaking about the Supreme Court decision  
22                now, doesn't extend to a doctor's question  
23                when it's made for purposes of obtaining  
24                medical treatment, and therefore any  
25                statement given then would be

1 non-testimonial. I don't find anything in  
2 the Supreme Court's decision that suggests  
3 that.

4 But, I cite it to say because I think  
5 that it is an opinion that touches on the  
6 issue that we are talking about here. It's  
7 a different set of circumstances, but in  
8 that case the Supreme Court said quite  
9 explicitly that a doctor's request for  
10 information for treatment purposes does not  
11 fall under the purview of Hammond and Davis,  
12 but the Supreme Court in doing that  
13 explicitly said that the statement -- that  
14 it rejected the view that a statement could  
15 be testimonial if a reasonable declarer could  
16 expect it to be used prosecutorially.

17 That really diverts from the whole  
18 thrust of the Davis case, which is why I  
19 don't believe that it's accurate. And I get  
20 to say this, even though they are obviously  
21 wiser than I am because they are in the  
22 California Supreme Court.

23 I am satisfied that the better view is  
24 if the record is made mandatory, and I am  
25 speaking of government or medical personnel

1 who are not connected to the Police; if the  
2 requirement of the document, if there is a  
3 requirement that the document be made by  
4 law, there is an understanding that such a  
5 document could be used in subsequent  
6 prosecution. And, in fact, it would have to  
7 be reported, then I do not see how that  
8 document can avoid a Davis analysis. And I  
9 think any Davis analysis on that would find  
10 it to be testimonial, and in absence of the  
11 witness I will not allow it in. The  
12 objection is upheld.

13 MR. SKRZYNSKI: Judge, then I would like a  
14 recess of this matter so that I can produce  
15 the doctor that did the M.R.I.

16 THE COURT: Approach the bench. In  
17 fact, I want to see both Counsel in chambers.  
18 (The Court in recess at 4:50 p.m.; the Court  
19 reconvened at 5:02 p.m.)

20 THE COURT: All right. We're back on  
21 the record. I understand that the  
22 Prosecution has decided not to call the  
23 witness, is that correct?

24 MR. SKRZYNSKI: That is correct, Your  
25 Honor.

1 THE COURT: And you have no other  
2 witnesses to proffer, is that correct?

3 MR. SKRZYNSKI: That is correct, Your  
4 Honor.

5 THE COURT: All right. Motion -- are  
6 there any witnesses for the Defense?

7 MR. WHITE: None, Your Honor.

8 THE COURT: Motion.

9 MR. SKRZYNSKI: Your Honor, I move at  
10 this time to bind over on charges of First  
11 Degree Felony Murder and First Degree Child  
12 Abuse.

13 We had testimony from Heather McBurney,  
14 the mother of the child, that the Defendant  
15 was in care of the victim. And that we  
16 further had testimony that he knowingly  
17 caused serious harm. There was testimony  
18 about the fact that he told Detective Sovik  
19 that he took the baby and threw the baby  
20 into the crib two feet away, that the baby  
21 hit the rails of the crib with its' head and  
22 immediately started to seize and then shortly  
23 thereafter the baby went limp and he called  
24 911.

25 He has had previous experience doing the

1 same kind of a thing and causing injury to a  
2 child. He knew that, and anybody would know,  
3 that throwing an infant two feet away into a  
4 crib is likely to cause serious harm to the  
5 kid and that's exactly what happened. We  
6 also have testimony by Heather that the child  
7 was only 11 months old, so that's under 18.

8 The testimony of Dr. Dragovic reflected  
9 that the baby died as a result of blunt  
10 force trauma and the complications. And the  
11 doctor explained extensively what those  
12 things were, including the fact that the  
13 brain swelling led to death of the brain  
14 stem, which led to brain death, which  
15 ultimately is the cause of death here.

16 As far as felony murder is concerned,  
17 there is no question that the Defendant  
18 caused the death of the child. And no  
19 question that out of the three intents that  
20 are necessary for Second Degree Murder that  
21 he at least created a very high risk of  
22 death or great bodily harm knowing that death  
23 or great bodily harm was the likely result.  
24 And he did this in the course of committing  
25 a First Degree Child Abuse, which I said



1 before has been shown by the People, and  
2 there of course was no justification or  
3 excuse, or anything that would reduce this to  
4 a lesser crime.

5 For those reasons, Judge, I am asking to  
6 bind him over on First Degree Felony Murder  
7 and First Degree Child Abuse.

8 THE COURT: Response.

9 MR. WHITE: Yes, Your Honor. The  
10 quantum leap that the People ask you to make  
11 is finding probable cause that a statement  
12 made by Steven McBurney that -- supposedly  
13 to Sergeant Sovik that he threw Madison from  
14 two feet away into her crib and her head hit  
15 the wood is enough to -- for you to conclude  
16 that he knowingly and intentionally caused  
17 serious physical harm to this child.

18 This is the crib -- this is the padded  
19 crib, pad around, and a mattress at the  
20 bottom. We would have to say that this is  
21 as of throwing a child on concrete, throwing  
22 a child out of a car, throwing a child onto  
23 a hard floor. We don't have anything close  
24 to that.

25 Assuming that Mr. McBurney did make that

1 statement, Your Honor, we don't have anything  
2 close to the threshold necessary to impute  
3 knowledge to him that this act would cause  
4 the injuries that ultimately presented  
5 themselves with Madison and the subsequent  
6 complications that arose from those injuries.

7 The testimony of Heather was that  
8 Madison had a variety of medical conditions.  
9 She was in treatment on a regular basis, she  
10 was seen by a doctor once or twice a month  
11 for her whole life. If this was an abused  
12 child, certainly someone would have known it  
13 prior to November 30th, 2006. Heather  
14 herself was an R.N.

15 The statement by Sergeant Sovik that the  
16 client -- that my client supposedly made  
17 that the -- threw the child from  
18 approximately two feet away, I suggest Judge  
19 is inherently suspect, because when I was  
20 asking the police officer, you know, the  
21 things that were in quotes in your report  
22 were they direct quotes by the Defendant;  
23 yes, but the things that were not in quotes  
24 he said sometimes yes sometimes no.

25 Well, we know that from my

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cross-examination the fact that he has allegedly threw the child from two feet away was not in quotes, it was his paraphrasing. And that the circumstances under which that statement was allegedly made are, again, inherently suspect. Why wasn't it recorded? Why wasn't it at least, you know, cassette recorded or something of that nature to ensure accuracy? Is that what law enforcement is reduced to in order to obtain convictions?

So, I believe that Sergeant Sovik's testimony should cause this Court great concern, because without this statement being offered into evidence, that there is nothing to suggest there was any intention to harm whatsoever. Now, the good Dr. Dragovic's testimony, I will renew my Motion that you strike autopsy and his testimony in its entirety, because if the doctor as he testified solely relied on examination of the child's body and the subsequent neuropathological tests and did not look at the South Lyon Police Department's report and did not look at the U of M records, or the

1 statements by U of M doctors, then how would  
2 he know whether this child fell out of a car,  
3 a third story window, or what?

4 That is an inherent incredibility, Judge,  
5 that cannot be overcome. How would he know,  
6 because all of those pieces of information  
7 were not introduced into evidence in this  
8 case, not the police report, not the  
9 hospital records, not one U of M physician.  
10 So, I believe under MRE.703 that you should  
11 strike that autopsy in its' entirety and  
12 strike the good doctor's testimony supporting  
13 it.

14  
15 But, assuming that you don't grant my  
16 Motion, Judge, the doctor at some point  
17 would have to -- did extend his level of  
18 expertise, level of scientific certainty to a  
19 point that causes -- would cause any jurist  
20 and, I believe, it should cause this Court  
21 great concern too, that standing over this  
22 crib and throwing a child onto a padded  
23 surface is enough to cause blunt trauma brain  
24 injury ultimately leading to a fatality.  
25 That's what he testified to, that's what he

1           said. And I think, Judge, at some point you  
2           have got to say that's enough.

3           You do have credibility responsibility,  
4           you do have as an examining Magistrate, the  
5           obligation to not only hear what is said, but  
6           determine whether it's plausible under a  
7           common sense standard. And to suggest that  
8           that is enough to cause fatal brain injury is  
9           irresponsible, and it came out of that  
10          witness stand in this Court.

11          So, I don't believe, Your Honor, that the  
12          Prosecutor has shown anything approaching a  
13          knowledgeable and intentional act to cause  
14          serious harm, an intention to kill, an  
15          intention to cause great bodily harm, or a  
16          reckless -- knowingly created a high risk of  
17          death or great bodily harm by a reckless act.

18          The prior conviction that the Prosecutor  
19          has relied on is merely a finding of  
20          recklessness. And that in this case, at most  
21          what you have, is a finding of recklessness;  
22          an unforeseen injury. The Prosecutor has  
23          not met his burden, Judge. I believe at  
24          most you should bind this over on a Second  
25          Degree Child Abuse; at most. If you do

1 grant my Motion to Strike the Doctor's  
2 testimony then you should not bind it over  
3 at all. This matter should be dismissed.  
4 And, at the conclusion of the Court's ruling  
5 I would like to address the issue of bond.

6 THE COURT: All right. This matter  
7 comes before the Court on a charge of First  
8 Degree Murder, and that the Prosecution has  
9 charged the Defendant on or about November  
10 30th, 2006 in the City of Lyon, while in the  
11 perpetration or attempt of perpetration of  
12 Child Abuse in the First Degree and Murder  
13 one Madison McBurney.

14 It is further charged that the Defendant  
15 did knowingly and intentionally cause serious  
16 harm to Madison McBurney, age 11 months,  
17 child.

18 As far as the ruling, the Court is going  
19 to not receive People's Exhibit Two.

20 (Denial of admission of People's Proposed  
21 Exhibit Number Two by the Court)

22 THE COURT: On reflection, I don't  
23 think I need it. I don't find it to be  
24 relevant to my analysis. I know the  
25 Prosecutor's position on this, but I don't

1           happen to share it.

2           Defense asks -- advocates that I reject  
3           the findings of the medical examiner's.  
4           It's difficult to do that under current  
5           standards, in that, I would have to reject  
6           the -- I would have to find the medical  
7           examiner's testimony to be inherently  
8           incredible, and I don't see how I can find  
9           that. I have nothing on this record that  
10          would make his testimony inherently  
11          incredible.

12          What I have is a dead 11 month old girl.  
13          And I have a dead 11 month old girl who  
14          didn't die for no reason. Her heart didn't  
15          stop, she didn't suffer from cancer. She  
16          died, I think, according to the medical  
17          examiner's testimony, as a result of an  
18          injury that came as a result of trauma.  
19          And, interestingly enough, that trauma seems  
20          to have come exactly at the point when the  
21          actions of the Defendant and the testimony  
22          that I have had, it's a real simple analysis  
23          for me.

24          I have a dead child, I have a reason the  
25          child is dead by the actions of the

1 Defendant. The actions of the Defendant I  
2 believe are sufficient under the evidence  
3 that presented to me to meet the standard to  
4 establish that he did intentionally and  
5 knowingly cause serious injury. I happen to  
6 think that throwing a child of that age at  
7 that distance -- I can remember many times  
8 being told by my wife as I pitched my child  
9 up into the air to catch him, how dangerous  
10 that was. And I remember I didn't believe  
11 her, because I loved to throw my son and my  
12 daughter into the air, and my nieces and  
13 nephews.

14 As this as a side, I went to a doctor and  
15 talked about it and I was told about how  
16 dangerous it could be at that age. Your  
17 client didn't have that knowledge, and I  
18 can't attribute it to him. But, I can say  
19 that any reasonable human being throwing a  
20 child the distance that he says he threw the  
21 child, seems to me, knows that he could  
22 intentionally or knowingly cause serious  
23 harm. That is satisfactory to me with regard  
24 to this case.

25 More; she's dead. She is dead as a



1 result of a trauma and there is reason to  
2 believe the medical examiner is correct in  
3 that trauma, since there is no other  
4 reasonable explanation for the reason that  
5 trauma exists, but the throwing by the  
6 Defendant.

7 Given the Statute with regard to First  
8 Degree Murder, that I think is satisfactory.  
9 And while both sides have wanted me to take,  
10 I think, a more complicated look at this than  
11 that, I don't think that the law requires  
12 that I take a more complicated look than I  
13 have just taken at it. I think much of what  
14 the Prosecutor proffered me beyond that  
15 analysis is not necessary to my finding,  
16 which is the basis of my ruling with regard  
17 to two. And I am not all together certain I  
18 am comfortable with that additional stuff in  
19 terms of the knowledge argument that the  
20 Prosecutor has put out, but I don't to reach  
21 that issue. I was thinking about it when I  
22 was making the Crawford ruling that I  
23 probably didn't have to reach that issue.

24 But, having said all that, I am  
25 satisfied that the Prosecution's burden to

1 establish that the crimes charged have been  
2 committed has been met, and their burden to  
3 establish the Defendant is the person who  
4 probably committed those crimes has been met.  
5 And thus I am obligated under the law to  
6 bind this matter over to Oakland County  
7 Circuit Court and I so do on both counts. I  
8 will hear you on bond.

9 (The Court binds Defendant over on both  
10 counts)

11 MR. WHITE: Your Honor, in light of  
12 the bind over, I ask that you set bond.  
13 There is no bond set.

14 THE COURT: Mr. Prosecutor, what is  
15 your opinion on that?

16 MR. SKRZYNSKI: Judge, the circumstances  
17 have only changed for the worst for the  
18 Defendant, and I think that it's appropriate  
19 that he be held without bond. It's a First  
20 Degree Murder.

21 THE COURT: How can you tell me he is  
22 not a flight risk? You can't. I am just  
23 denying it.

24 MR. WHITE: Well, Your Honor, he was  
25 charged with a serious offense before and

1           there was never a problem with him going to  
2           court.

3           THE COURT:           Counsel --

4           MR. WHITE:           He was charged with a 15  
5           year felony before, and there isn't any  
6           indication whatsoever --

7           THE COURT:           Counsel, this is life.  
8           The reason that your Courts can deny bond is  
9           because of that very basis, and I can't rule  
10          with any degree of certainty based on  
11          anything I have in front of me that your  
12          client will not flee.

13          I, frankly, don't see him as a danger to  
14          the community, I really don't. But, I don't  
15          -- were I in his circumstances where I'm  
16          charged with First Degree Murder with the  
17          murder of an 11 month old child, and knowing  
18          I was going to trial in front of an Oakland  
19          County Jury, I would say to myself, "Hmm,  
20          what are the odds there"? Even with a  
21          brilliant defense attorney I would have to  
22          calculate those odds, and I might decide  
23          that my odds were better in Canada.

24          MR. SKRZYNSKI: Thank you, Judge.  
25

1  
2

(At 5:00 p.m., the preliminary exam was  
concluded)

STATE OF MICHIGAN)

) SS:

COUNTY OF OAKLAND)

I, Christine E. Ebel, CER-5827, do hereby certify that I transcribed the foregoing Preliminary Examination, Volume II, recorded by Paul Ward, held May 17, 2007, before the HONORABLE BRIAN W. MACKENZIE, Judge of the 52nd/1st District Court, located at 48150 Grand River Avenue, Novi, Michigan, 48374, and that this is a complete, true, and correct transcript of the electronic recordings.



CHRISTINE E. EBEL, CER-5827

DATED: June 4, 2007